89-1305

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES BEN HOWELL, ET AL.,
Petitioners,

v

THE SUPREME COURT OF TEXAS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

One

Is it really true that the Feldman window is an illusory remedy?

(a) Was the Fifth Circuit correct in brushing aside without discussion this petitioner's primary and most urgently argued proposition: That the Supreme Court's subsequent decision in *Pennzoil v Texaco*, 481 US 1 (87) *(Texaco IV)*, imposed upon this petitioner, as a prerequisite to a Feldman window action in the federal district court, the obligation to *first exhaust his state remedies* by urging his federal grounds of attack upon the state rule in question, while he was still before the state court?

(b) Has the Fifth Circuit below not necessarily held that a litigant who fulfills the exhaustion requirement of *Texaco IV* by arguing his federal claim in state court thereby *forfeits* (on the theory that in doing so, he has "inextricably intertwined" his federal claim with the state judgment) his right to federal district court review of a federal claim that would otherwise be accessible through the Feldman window?

(c) Does it comport with reason or justice to hold that a litigant in fulfilling the exhaustion requirement thereby bars himself from the right of Feldman window review? If such be true, then, is not the Feldman window, in practical application, a non-existent remedy?

Two

Was the Fifth Circuit below correct in holding that the Rooker-Feldman rule applies, not only to allegedly erroneous judgments, but also to those that are wholly void for want of jurisdiction?

(a) Did *Rooker v Fidelity*, 263 US 413 (23), not expressly disclaim any intent to pass upon the right to federal review of allegedly void state court judgments? Does *Dist. Col. Ct. v Feldman*, 460 US 462 (83), contain any intimation that the Court was addressing the right to attack a void state judgment in federal district court?

(b) Is it not a well established rule that a void judgment may be collaterally attacked in any forum where it may be called into question? If so, is there any constitutional provision, any rule or statute, or any principle of comity that prevents a federal district court from inquiring whether a state judgment brought before it is void for want of jurisdiction on the part of the rendering court?

Three

Did the Fifth Circuit below err in affirming sanctions upon a holding that the district court, in levying sanctions committed no clear abuse of discretion?

(a) Is the abuse of discretion standard the proper one for the review of Rule 11 sanctions?

(b) Are the sanctions not in derogation of the First Amendment right of petition? In such case, does it not follow that no sanctions may be imposed without a showing of flagrant abuse of that constitutionally protected right? Does this record intimate any such showing?

(c) With particular respect to the case in bar, was not the abuse of discretion standard singularly inappropriate in view of the fact that the key ruling of the district court was upon a pure question of law; *i.e.* that the federal court "was clearly without jurisdiction?"

PARTIES

Charles Ben Howell is the principal petitioner and was the plaintiff and the appellant in the respective courts below. Ken E. Mackey was the attorney for petitioner Howell in the US District Court and is co-petitioner here with respect to the sanctions imposed, as he was co-appellant in the Fifth Circuit.

Respondents, appellees and defendants below, are the Supreme Court of Texas and its justices holding office at the filing of the complaint* (and their successors in office), also, the Attorney General of Texas, the Honorable Jim Mattox, and the District Clerk of Dallas County, Texas, the Honorable Bill Long. Petitioner considers that his action against Mr. Long is moot in that the fund in question was disbursed after the US District Court denied a preliminary injunction against disbursement and it was, by Mr. Long, then distributed.

Other respondents hereto, appellees and defendants below, are the state court defendants, appellees and respondents, Homecraft Land Development, Inc., U.S. Home Corporation, and Stewart Title Company.

This cause of action was commenced in the US District Court for the Western District of Texas at Austin, cause no. A-88-CA-644. The trial court denied a preliminary injunction, assessed sanctions for filing a lawsuit that was "without jurisdiction," (PA 14, 24) and dismissed the complaint. Appeal

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*The Honorable Thomas R. Phillips, the Honorable Franklin Spears, the Honorable C. L. Ray, the Honorable James P. Wallace, the Honorable Ted Z. Robertson, the Honorable William Kilgarlin, the Honorable Raul Gonzalez, the Honorable Oscar Mauzy and the Honorable Barbara Culver.

was taken to the United States Court of Appeals for the Fifth Circuit which affirmed, no. 89-1032.

The case name in the courts below was the same as the case name being used in this Court.

The underlying state court litigation, *Charles Ben Howell v Homecraft Land Development, et al.*, was initiated in the 298th District Court of Dallas County, Texas before the Honorable Sidney A. Fitzwater, cause no. 83-4680. Final judgment and order overruling motion for new trial were signed by his successor, the Honorable Will Pryor. An appeal was prosecuted to the Texas Court of Appeals for the Fifth District of Texas at Dallas, cause no. 06-86-1164-CV.

An application for writ of error was thereafter filed with the Supreme Court of Texas, no C-7,113, which overruled the motions for disqualification that are the principal subject of this federal litigation and then denied the writ application and thereafter denied rehearing. The United States Supreme Court denied certiorari to the Texas Supreme Court, cause no. 88-923. The same case name was employed in all courts.

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OPINION BELOW

Howell v SCT, 885 F.2d 308 (5-TX 89) (PA 1-13); *Howell v SCT*, unpub. (WDTX 88) (PA 14-33). Companion case: *Howell v Homecraft*, —US—, 109 SCT 1124, cert den, sum. 57 USLW 3491 (no. 88-923, 21FE89) (Homecraft III); *Howell v Homecraft*, decided w/no opn. 31 TXSCTJ 340 (TXSM 88) (orders at PA 37-40) (Homecraft II); *Howell v Homecraft*, 749 SW2d 103 (TXAP 87) (Homecraft I).

JURISDICTION

Supreme Court: 28 USC §1254(1); Trial Court: 42 USC §1983. Fifth Circuit judgment, October 11, 1989 (PA 33-4); rehearing denied, November 8, 1989 (PA 34). Extension Application A-559 pending.

COURT RULES INVOLVED

Texas Rules of Appellate Procedure:
Rule 15.

(a) Within thirty days after the filing of a proceeding in a court of appeals, the Supreme Court, or the Court of Criminal Appeals, any party may file with the clerk of the court a motion stating grounds why a justice or judge before whom the case is pending should not sit in the case. The court shall allow the filing of a motion after the expiration of thirty days if the motion is grounded upon reasons not known within the thirty day period and upon a showing of good cause.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with notice that movant expects the motion to be presented to the justice or judge ten days after the filing of such motion unless otherwise ordered by the justice or judge. Any other party

may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

(c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

(d) to the extent that a motion to recuse is granted, the matter is not reviewable. To the extent that a motion to recuse is denied, the normal appellate review process shall apply.

Rule 15a.

(1) Disqualification

Appellate judges shall disqualify themselves in all proceedings in which:

> (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law (except in the context of a district or county attorneys office) served during such association as a lawyer concerning the matter; or
>
> (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
(Adopted by Supreme Court order of July 15, 1987, eff. Jan. 1, 1988.)

STATEMENT OF THE CASE

The history of the case and the contentions made are extensive.[1] However, the essential question raised by this petition is whether the US District Court erred in dismissing for want of jurisdiction. For this purpose, the statement in the opinion of the Fifth Circuit is sufficient:

> . . .[Petitioner] brought this §1983 action seeking declaratory and injunctive relief. The district court concluded that Howell had already litigated his

[1]The disqualification claims that petitioner leveled against the members of the Texas Supreme Court are in the appendix hereto. (PA 44-88) Petitioner's motion was overruled without comment. (PA 37,8 40-3). Homecraft II, 31 TXSCTJ at 340. For discussion, see Homecraft III, pet'n cert., passim.

The complaint was summarized, although not fully and with complete accuracy, in the District Court opinion. (PA 14,6-7, 25-8)

Petitioner complained to the Texas Supreme Court that the Texas Court of Appeals in its opinion made a number of erroneous statements of fact and that it omitted and mis-characterized many of this petitioner's contentions. However, it throws considerable light on the nature of the underlying dispute. Homecraft I, 749 SW2d at 103.

In his previous petition, this petitioner outlined the substance of several of his state law claims, which he urges required a reversal by the Texas Supreme Court. Homecraft III, pet'n, 4-8, particularly nn.3 & 4

claims in state court and dismissed for lack of jurisdiction. The district court assessed attorney's fees and expenses against Howell and his attorney as Rule 11 sanctions. (PA 1)

The Fifth Circuit affirmed (PA 1). From the outset, petitioner has not challenged the existence of the Rooker-Feldman rule which holds that the statute fixing the jurisdiction of federal district courts precludes "appellate jurisdiction" over state court decisions. *Rooker, Feldman* at 462. Instead, petitioner has urged the application of the Feldman window, first recognized by this Court in 1983, holding that district courts *do* have jurisdiction to examine state court rules that were involved in prior state litigation between the parties, as long as the state rules were not "inextricably intertwined" with the state action. *Feldman*, at 483-8.

The primary question raised here is the proper definition of "inextricably intertwined."

The courts below took the position that if a litigant has previously asserted the federal invalidity of a state rule in state court, he has thereby created "inextricable intertwine[ment]" barring subsequent Feldman window attacks upon that rule.

Petitioner's response is that this Court's subsequent decision of *Texaco IV* imposed an exhaustion requirement on Feldman window litigation. *Certainly, a party cannot be held to have forfeited his right to litigate in the federal district court by fulfilling a mandatory prerequisite in order to enter that forum.* Any other position fails to comport with logic or justice; the Feldman window has effectively been destroyed.

Petitioner vigorously urged *Texaco IV* upon the Fifth Circuit and insisted that the District Court had completely misconstrued that authority. In spite of petitioner's extended argument of *Texaco IV*, the Fifth Circuit chose to issue an opinion that was completely silent with reference to the Supreme Court's most recent decision concerning Feldman window litigation, *i.e.*, *Texaco IV*.

REASONS FOR GRANTING THE WRIT

Summary of Argument

First Question: The decision of the Fifth Circuit effectively destroys the Feldman window, expressly recognized in 1983 by the Supreme Court as a means to test state court rules. *Feldman* at 483-8. See "Statement of the Case." In order to meet the exhaustion requirement of *Texaco IV*, a litigant, while he is before the state court, must urge his federal grounds of attack upon the offending state rule.

Intent of Congress is the key. It has not been intimated that any constitutional limitation is involved. Instead, the no-appellate-review-of-state-decisions-rule, the jurisdictional preclusion rule, is based solely upon the jurisdiction statute. *Rooker* at 416. That statute is not explicit. The Supreme Court has construed the intent of Congress as providing that federal district court jurisdiction be "strictly original." The Supreme Court has now found an intent of Congress that a "general challenge" to a particular state rule is within district court jurisdiction. *Feldman* at 487. *Congress did not intend an illusory remedy.* It follows that where exhaustion is mandatory, such exhaustion does not deprive the district court of jurisdiction over the general challenge.

Second Question: The District Court wholly failed to

address petitioner's alternate grounds for federal jurisdiction—that the rulings of the Texas Supreme Court are wholly void and subject to collateral attack in any court, federal or state, where they may be drawn into question. *Pennoyer v Neff*, 95 US 714 (1878); *Nalle v Austin*, 22 SW 960 (1893).

The Fifth Circuit has overlooked that *Rooker* expressly pointed out that it was not addressing a situation where there was a claim that the state judgment was void, only that it was erroneous. Neither did *Atlantic Coast v. Engrs.*, 389 US 281 (70), or *Feldman* intimate any question as to the essential validity of the state judgment.

Texas has long held that the judgment of a disqualified judge is no judgment at all. There is no logical basis to apply jurisdictional preclusion to void-judgment claims. If a state court has jurisdiction to hear a void-judgment attack upon the judgment of a sister state, a federal court should, by logic, have equivalent power. Respondents have advanced neither argument nor authority to the contrary. Neither do we find any support for such a position in the decisions below. The void-judgment attack should have been decided on its essential merits.

Third Question: The abuse of discretion standard is inappropriate for appellate review of Rule 11 sanctions. Sanctions may only be applied for flagrant abuse of the constitutionally protected right of petition. Abuse of discretion was singularly inappropriate in this case because the dismissal was upon a pure point of law. The Fifth Circuit should have independently reviewed the District Court's implicit holding that petitioner's jurisdictional claims were wholly untenable. Inasmuch as petitioner's claims were eminently arguable, he may not be sanctioned even, if as held by the District Court, he was wholly or partially motivated by

supposedly illicit considerations.

QUESTION 1: The Feldman Window Was Available

Civil Rights—1871 Through Younger

Lower federal courts were truly without jurisdiction over state litigation before the 14th Amendment and the Civil Rights Acts. Coming in the wake of the Civil War, these enactments contained sweeping limitations upon state actions against the individual. The lower federal courts were established as the primary forum to redress claims for the deprivation of civil rights.

Pennoyer v Neff, 95 US 714 (1878), held that a state judgment, entered without jurisdiction, was void. It further held that a void state court judgment could be attacked *in a federal court.* The case is hornbook authority regarding void judgments and collateral attack.

The right of a state prisoner to challenge his conviction in a federal court was fully recognized in *Ex Parte Royall*, 117 US 241 (1886). However, the Court forcefully declared the monolithic policy that a state prisoner will not be heard in federal court until he has fully exhausted his state remedies. He must first specifically raise his federal claim in every available state forum. Ever since *Royall*, it has been accepted that *any federal court* is empowered to intervene in state court proceedings at *any* stage. *Id. See also, Fay v Noia*, 372 US 391, 400-6,36(63). *A fortiorari* Congress has the power to provide that *any* federal court may annul *any* state proceedings whatever, on federal grounds, at *any* stage, even when the state proceedings are past judgment.

The federal courts were slow to respond to these

enactments until about 1960. Thereafter, such cases as *Monroe v Pape*, 365 US 167(61), *Mitchum v Foster*, 407 US 225,39(72), and *Zwickler v Koota*, 389 US 241 (67) fully confirmed the lower federal courts as a forum to challenge unconstitutional state action.

Increasingly, the federal courts were invoked against state prosecutions, particularly after *Dombrowski v Pfister*, 389 US 479 (65). In the criminal area, the practice was effectively terminated by *Younger v Harris*, 401 US 37 (71), requiring federal abstention in state criminal actions. Initially, it was considered as being restricted to criminal cases, but it has been expanded. Most recently, it has been applied to private-party litigation if an "important" state interest is involved. Following *Juidice v Vail*, 430 US 327 (77), and *Texaco IV*, lower federal courts have been fairly well excluded until state litigation between the same parties regarding the same claim is concluded.

Rooker and Jurisdictional Preclusion

Coming before the civil rights revolution, *Rooker* was a simple one. A disappointed state litigant brought a federal suit asking that a state judgment be annulled for violation of the Contract Clause and the 14th Amendment. It could easily have been disposed of by applying well defined principles of jurisdiction and preclusion. *Pennoyer*, 95 US at 714; *Cromwell v Sac*, 94 US 351 (1887). Instead, The Supreme Court went further and held that *the judicial code* did not authorize a federal district court to "exercise appellate jurisdiction."

We emphasize: *Rooker* was not *decided on constitutional grounds. Pennoyer, Royall,* and similar decisions were left unquestioned. Congress retains the naked power to provide that any federal court may intervene, or even annul, state proceedings when federal grounds exist. Commentators have

consistently questioned the transposition of issues that are essentially preclusion issues into jurisdictional questions creating numerous incongruities.[2] A well established rule holds that jurisdiction, once acquired is never ousted by subsequent events. However, *Rooker* overrides that rule; *it possesses the power to oust a federal court of jurisdiction,* already acquired.[3] The State Bar litigation is an example of ouster.[4] In 1976, Petitioner Howell filed a §1983 action alleging that a state disbarment suit was being prosecuted in violation of his federally protected rights. The district court invoked abstention citing *Younger,* but declared that petitioner had the right

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[2] (1) Assume that A, a North Dakota citizen-resident, in his home-state court, sues B, a South Dakota citizen-resident on a federal ground using long arm jurisdiction. A take-nothing judgment ensues.

(2) A then obtains a default on the same claim in South Dakota federal court. Thereafter, seeking to avoid the default, B argues that the federal court was without jurisdiction; Rooker would support B's contention that the judgment is void and subject to collateral attack.

(3) However, if the default were taken in the state court of South Dakota, the ordinary rules of preclusion would apply—a plea of preclusion must be timely and expressly pleaded. The default would prevail if taken in state rather than federal court. See Theis, Res Judicata, 70 NWLR 859,79 n.114.

(4) Further, if the original take-nothing emanated from a North Dakota federal court rather than a state court, it would be indifferent whether the South Dakota default were secured in federal or state court. Rooker does not deprive a federal court of one state of jurisdiction to review the decision of a federal court of another state. Waiver would apply; the default would stand.

[3] (1) Assume that X brings a federal action against Y for a civil rights deprivation. While the federal action is pending, Y obtains a state court summary judgment enforcing the disputed transaction.

(2) X and his counsel pondered whether the federal claim, already pending in federal court, should also be raised in the state court. However, they decided not to do so because of the Supreme Court's assurance that a litigant is entitled to a federal forum for his federal claims. Rooker and its progeny, to be discussed, would hold that the state judgment ousted the federal jurisdiction that already had been invoked. The right to ask for certiorari from the state court would also be lost for failure to raise the federal claim in state court.

(3) On the other hand, according to the present Fifth Circuit ruling, the mere act of presenting the federal claim to the state court would foreclose the jurisdiction of the federal district court. If the federal claim is presented to and rejected by the state court, X's only remedy is the statistically insignificant right to petition for certiorari. X is placed in an impossible quandary. Heads, you lose; tails, you still lose.

[4] Howell v State Bar (IV), 466 US 950 (84), 52 USLW 3704 (23AP84); Howell v State Bar (III), 710 F2d 1075 (5-TX 83); State Bar v Howell (II), 103 SCT 1515 (83); Howell v State Bar (I), 674 F2d 1027 (5-TX 82).

to return "after the state court proceeding is completed," citing *England v Exrs*, 375 US 411 (64) (opinion quoted, *State Bar I*, 674 F2d at 1028).[5]

Relying on the district court's assurance, this petitioner had presented no federal claims in state court. After the state litigation was concluded, petitioner returned to the district court, but it had changed its mind; case dismissed.

Petitioner Howell appealed and won reversal; held, the district court erred in declaring *England* applicable; however, petitioner entitled to federal trial because it had been promised. *State Bar I*, 674 F2d at 1031. The Supreme Court vacated. *State Bar II*, 103 SCT at 1515. Held on remand, the *Rooker* line precluded federal jurisdiction. All but one federal claim was barred. *State Bar III*, 710 F2d at 1075.

The teaching of State Bar: On March 4, 1976 when the District Court abstained, it was impossible for the Rooker line to apply—*the state case had not gone to judgment.* On the other hand, *Younger* is a rule of comity with *no jurisdictional attributes*—a deference to Our Federalism. Had the district court refused to abstain, any judgment in petitioner's favor *would have been jurisdictionally valid*, only attackable on direct appeal. It may have established the law of the case even if a *Younger* reversal had ensued. In fact, on March 4, 1976, when the district court abstained, it was possessed of the naked power to entirely remove the state proceedings. *GA v Rachel*, 384 US 808 (66); 28 USC §1443.

The inevitable conclusion: *Rooker* has invested state courts with power to *oust federal courts of jurisdiction.* The

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[5] Plaintiff denied that Younger was applicable, primarily on strength of the 5th Circuit's previous decision in Polk v State Bar, 480 F2d 998 (5-TX 73), but according to Middlesex County v Bar, 457 US 423 (82), Polk was wrongly decided.

Rooker line far exceeds mere preclusion, waived unless timely pleaded. The final irony of *State Bar:* Relief from ordinary preclusion is available if the previous action did not provide a full and fair opportunity to litigate the preclusion being asserted. *State Bar I.* However, in "jurisdictional preclusion" cases, the federal court is barred from applying such principles. *It must dismiss. State Bar III.*

England—A Retreat from Jurisdictional Preclusion

England, 376 US at 411, challenged a medical practice act. The federal district court abstained to allow state court construction.

On the plaintiffs' return to federal court, it dismissed, finding state rulings on the federal issues preclusive. *Rooker* would not only hold the rulings preclusive but *jurisdictionally so.*

No preclusion!! said the Supreme Court. The federal plaintiffs were in the state court against their will, *only because the federal court sent them there.* A federal court may bifurcate a lawsuit to preserve a federal plaintiff's right to litigate in his chosen forum. *Rooker* was argued, but the Court chose not to apply it. *Briefs, England v Exrs.*, 11 LE2d 1072.

Petitioner Howell's situation is comparable to the *England* plaintiffs'. Although petitioner was not ordered into state court. *Homecraft,* at the outset, presented no federal aspects; he had no choice but to sue in state court. As discussed below, he was forced to remain and exhaust all avenues of relief before moving to federal court. His presence in state court was just as involuntary as the *England* plaintiffs.

While in state court, both petitioner Howell and the England plaintiffs asserted their federal claims and suffered adverse rulings. Were these rulings preclusive, either in the ordinary sense or jurisdictionally? No! said *England.* Plaintiffs should have given notice but should not have argued their federal claims in state court. Thus, there would have been no preclusion, reasoned the Supreme Court. However, *inasmuch as the plaintiffs legitimately misunderstood what was expected of them,* they were nevertheless relieved from ordinary preclusion.[6] Jurisdictional preclusion was argued but not addressed.

Feldman—Jurisdictional Preclusion Re-Confirmed

Feldman, 460 US at 462, caused reversal of *State Bar I.* Two graduates of non-accredited law schools sought waivers to take the bar examination from the state-equivalent court. Upon denial, they brought federal suit. The Supreme Court reaffirmed *Rooker* and the doctrine of jurisdictional preclusion but recognized a window *that would not be closed by jurisdictional preclusion.*

> To the extent that . . . [these applicants] mounted a general challenge to the constitutionality of . . . [the court rule in question], the District Court did have subject-matter jurisdiction over their complaints.

[6] In State Bar IV, 52 USLW at 3704, 466 US at 950, plaintiff Howell argued that he, likewise was in state court against his will having been hailed into that court to answer charges filed by a state agency. He sought to reserve his federal rights for litigation in a federal forum by promptly asserting them, before the state court went to judgment, in a federal court which, over his objection, invoked abstention. He further sought to reserve them by giving notice thereof to the state court. He reasoned that the 5th circuit had, with good grounds, held that he should be relieved from the ordinary rules of preclusion. Citing England, he further urged that jurisdictional preclusion should not be allowed to reach claims that had already been lodged in federal court prior to the time of the state judgment. He argued that jurisdictional preclusion had never been applied in the abstention context and should not be applied in that area because it would inevitably lead to the forfeiture of the right to litigate federal questions in federal courts. Even though certiorari was denied, plaintiff considers the argument still viable; the denial of certiorari proves nothing.

> The difference between seeking review . . . of a state court's final judgment . . . and challenging the validity of a . . . rule has been recognized . . . implicitly, in the opinions of this court. . . .
>
> [T]here is a subtle . . . distinction between . . . claims which a frustrated bar applicant might bring. . . . The first is a constitutional challenge to the state's general rules and regulations governing admission; . . . *[F]ederal courts do exercise jurisdiction over . . . [such] challenges. . . .*"

Id. 482-7 (emphasis added). In describing permissible federal claims, the Court spoke of those which were not "inextricably intertwined" *(id.* 482, n.16) with the individual plaintiff's case, thereby creating the litmus test for Feldman window claims. Petitioner Howell asserts that his challenge of TXRAP 15a meets the test of "not inextricably intertwined." We do not believe that the courts below essentially disagree except that they considered that petitioner committed "inextricable intertwine[ment]" by urging his federal claims in state court.

Texaco II—The Feldman Window Applied

In 1985, Pennzoil obtained a state court judgment against Texaco. Before appealing, Texaco entered the U.S. District Court with seven federal claims, two of which attacked TXRCVP 364, requiring 100% security as the price of supersedeas. A preliminary injunction from the district court, *Texaco v Pennzoil,* 626 FS 250 (SDNY 86) *(Texaco I),* prohibiting enforcement of the state judgment pending the state appeal, was upheld by the Second Circuit. *Texaco II.* As to the two claims, the court rejected Rooker-type contentions of jurisdictional preclusion and applied the Feldman window. *Id.* 1141-5. Reminiscent of *England,* it observed that "Texaco

did not choose the Texas state court . . . but was summoned into that court by Pennzoil." *Id.* 1144. Held:

> . . . [Under *Rooker-Feldman*, five claims] must be dismissed *for lack of subject matter jurisdiction. Rooker*, however, does not bar a federal court from exercising jurisdiction over . . . [two of Texaco's claims] which allege that the Texas . . . supersedeas bond provisions deny Texaco due process and equal protection, as applied. Those claims have never been presented to or adjudicated by a state court. Nor are they "inextricably intertwined" with the barred claims. *Id.* (emphasis added).

The District Court below found *Texaco* distinguishable because, unlike Texaco, petitioner Howell had presented his federal claims to the Texas Supreme Court. Although the Second Circuit pointed out that the federal claims had not been urged in the state court,[7] the Supreme Court emphatically held that such *was*, in fact, necessary. We do not know the Fifth Circuit's views of *Texaco*. Although it is the latest Supreme Court decision in point, the Court omitted its mention.

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[7]The District Court below read Texaco II as holding that Texaco was entitled to litigate its federal claims in federal court "because they had not been presented to . . . [the] state court . . . (R.11) (emphasis added)." The Court has read too much from the Second Circuit opinion. Although that court discussed the fact that the federal claims had not been raised in state court, it is to be emphasized that five were turned away because they "lack[ed] subject matter jurisdiction," not because they had been urged in state court. Likewise, the two that were sustained were upheld, not because they had not been raised in state court, but on account that their subject matter made them appropriate for Feldman window litigation. A direct ruling by the Second Circuit that "If you had raised these claims in state court, you could not raise them here" would have been pure dicta. In any event, the Supreme Court took an entirely different view of not-raised-in-state-court and its views must prevail.

Texaco in the Supreme Court —The Feldman Window Confirmed

Texaco was unanimously reversed by the Supreme Court.[8] *Texaco IV.* Six opinions were written. The majority was grounded on *Younger v Harris;* the federal court should have abstained. Five justices (Powell, Rehnquist, White, O'Connor and Scalia) considered that *Younger* controlled; such was the *ratio decidendi.* Four justices (Brennan, Marshall, Blackmun and Stevens) disagreed, arguing that *Younger* should have limited application to civil litigation.[9]

The separate opinions of the justices are particularly important. As noted by the District Court below:

> [F]ive of the justices indicated agreement with the Second Circuit's determination that the Rooker-Feldman doctrine did not bar Texaco from proceeding on its claims in federal district court. *See Texaco . . . [IV]* (Scalia and O'Connor, JJ., concurring); *id.* at 1531 (Brennan, J., concurring in judgment); *id.* at 1534-5 (Blackmun, J., concurring in judgment); *id.* at 1536 n.3 (Stevens, J., concurring in judgment).

(R.10). Thus, the Feldman window was confirmed by the Supreme Court. Only Justice Marshall specifically expressed disagreement. 107 SCT at 1533. The remaining justices (Rehnquist, White and Powell) did not express themselves on the point.

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[8] In the interim between the Second Circuit opinion and the Supreme Court decision, the state judgment was affirmed. Texaco v Pennzoil, 729 SW2d 768 (TXAP 87) (Texaco III).

[9] It is clear that all state proceedings were concluded before petitioner Howell filed his federal complaint. Abstention only means federal trial court jurisdiction postponed, not denied. The abstention ruling of Texaco IV has no application in the case at hand.

In Texaco, the Supreme Court Necessarily Held That Raising the Federal Claim in State Court Does Not Create a Jurisdictional Preclusion

Throughout its opinion, the Supreme Court strongly and repeatedly implied that Texaco was being denied access through the *Feldman* window *because* it failed to raise its federal claim in state court.[10]

The pervasive theme of the *Texaco IV* majority was that those who do not first exhaust their federal remedies in state court *may not have access to the federal court by way of the Feldman window*, a message in direct conflict with the Fifth Circuit ruling that petitioner's right to access the Feldman window was forfeit *because* petitioner raised his federal claims in state court.

Feldman Itself Indicates That Raising The Federal Claim in State Court Does Not Bar the Feldman Window

In connection with his waiver application to the state-equivalent court, Feldman's counsel stated:

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[10]Sixteen times during its opinion, the Court quoted and discussed Younger abstention. The Court reiterated that Texaco had not applied to the state court. It emphasized that comity endeavors to protect federal rights in as non-obtrusive manner as possible.

The Court pointed out the policy that the states should have the first opportunity to interpret their laws. It stated that state adjudications regarding their statutes can even render federal decisions meaningless. It emphasized the possibility that state court construction could have given Texaco the desired relief. It stated that proper respect required that the states have the first opportunity to construe their laws.

The Supreme Court extensively criticized Texaco for not even attempting to secure state court relief. It declared itself unwilling to believe that the state could not grant relief in the face of Texaco's failure to make an attempt. It held that existing state decisions were not relevant because none of those authorities addressed the federal constitutional claim being made by Texaco. It concluded that "Because Texaco . . . did not give the Texas courts an opportunity" to construe Rule 364, the federal district court should have abstained.

Texaco IV. 107 SCT 1523, 1525 n.5, 1526-6, 1526, 1526 n.9, 1526, 1526-7, 1527, 1527 n.13, 1527-8, 1528, 1528, 1528-9 n.15, 1529 n.15, 1529.

> . . . [B]arring Mr. Feldman from the practice of law . . . would raise important [constitutional] questions . . . that Mr. Feldman is prepared to pursue in the United States District Court if necessary. . . .

Id. 466-7. He also stated that "serious questions under the United States Constitution are raised" by the procedures followed by the state-equivalent court. Feldman's counsel cited case authority in support of his position. Finally, Feldman's counsel stated that "the federal antitrust laws provide an alternative basis for questioning the legality of . . . [the contested] procedure," again citing case authority.[11] *Id.*

Contrary to the Fifth Circuit (PA 9, n.2), the Supreme Court, in *Feldman*, implicitly held that a presentation to the state-equivalent court of federal claims did not constitute a jurisdictional preclusion,[12] although it indicated that such action could constitute an ordinary preclusion. The Court stated that "We leave the question to the District Court on remand." *Id.* 487-8. No subsequent history of *Feldman* is available. It was error to dismiss petitioner Howell's case "for lack of jurisdiction." At most, only an ordinary preclusion was involved.[13]

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[11] In Feldman, the petitioning court and its judges argued to the Supreme Court that Applicant's presentation of his federal claims to the state court affected a Rooker-type preclusion, but Applicant argued that he was only effecting an England reservation.

However, the England reservation mechanism is only available in connection with Pullman-type abstention; not with Younger abstention. So held: State Bar I, 674 F2d at 1027. It follows that any attempted England reservation was ineffectual. Hence, the Applicant's presentation of claims to the state court was a general presentation making him subject to all preclusions that a general presentation will cause.

[12] Counsel submitted letters instead of formal pleadings to the court. This, the Supreme Court held, was a matter of indifference. Feldman 460 US at 477-82.

[13] Recognizing that Feldman expressly remanded ordinary preclusion ("res judicata") issues to the lower court, id. at 487-8, petitioner briefed those issues to the Courts below, but neither one addressed them. Space limitations require that full discussion be omitted herein.

All preclusion law, both ordinary and jurisdictional, springs from the same fulcrum, the

Younger Abstention Demands Exhaustion

Younger, 401 US at 37, holds that one who is the object of a criminal action may not have §1983 relief for the duration of one complete criminal prosecution. The long established rules also require that the criminal defendant fully exhaust his remedies; his federal claims must be asserted in state court while abstention is in effect.[14] Otherwise, both Supreme Court review on certiorari and collateral review will be denied.

Younger continues to march into the field of civil litigation. Both the authorities and sound judicial policy require that the litigant held in state court by Younger abstention must exhaust his state remedies by first asserting his federal claims in state court. That approach serves comity and Our Federalism as enunciated in *Texaco IV*, quoted above, in part. The case at bar is illustrative. Had petitioner Howell been forced by *Texaco IV* not to voice his federal claims in the Texas Supreme Court, all hope that the Texas court might sustain him would vanish. An England reservation would have done little more; petitioner would be on warning

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historic principle that, insofar as justice will permit, a single dispute should be litigated but once in a single forum. Ordinary preclusion must be rejected for much the same reasons as jurisdictional preclusion.

The general rule of preclusion is that it bars not only those issues that were raised but all that could have been raised. Cromwell v Sac, 95 US 351 (1876). This principle must be adjusted to accommodate our constitutionally mandated dual court system. The could-have-been-raised test would destroy the Feldman window just as surely as the Fifth Circuit's mandatory-exhaustion-creates-inextricable-intertwinement ruling.

Ordinary preclusion may not be applied where there has been no full and fair opportunity to litigate the issue in the prior action. Where the right of a federal forum has been guaranteed, the litigant has not had that opportunity until the predicates to entry have been satisfied. England at 411; State Bar I at 1031.

Where the litigant has had a choice of forum, he is bound by his choice, even on a could-have-been-litigated basis. Kremer v Chemical, 456 US 461 (82); MT v US, 440 US 147,64-5 (79). Petitioner Howell was not in state court as a matter of choice; the rules of ordinary preclusion are no bar.

[14] At least since Ex parte Royall, 117 US 241, the defendant must exhaust all state remedies by carrying his federal claim through the highest state court in which review may be had. After that, he may petition the United States Supreme Court, he may seek collateral relief in the federal district court, or he may assert both remedies. Fay v Noia, 372 US at 391,436.

not to strive to convince the Texas court his position was correct on pain of forfeiting federal review.[15]

It requires up to four years for a case to wend through the state system. Does it serve any policy of the state or its courts to muzzle the citizen for four years? The individual is placed in a terrible quandary, forced to travel a treacherous and expensive path to achieve the right assured by the Civil Rights Act, to litigate federal claims before a federal forum. The exhaustion rule, according not only the right but the obligation to present federal claims before state tribunals, must follow wherever *Younger* travels, in civil and criminal actions. Otherwise, the state litigant is saddled with two unacceptable choices: either forego his right to a federal forum for federal questions; or remain for years in legal limbo. When *Younger* forces a litigant to enter or remain in state court, both *Feldman* and *Texaco II* must be read as requiring the litigant desiring a federal forum to first urge his federal claims before the state court.

Texaco II and *Feldman* are confirmed by *Middlesex County Ethics v Garden*, 457 US 423 (82), applying Younger abstention to quasi-judicial attorney-discipline hearings. Nine passages in that case imply an exhaustion requirement on the would-be federal plaintiff.[16] Accord: *Moore v Sims*, 442 US

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[15]The manner in which bar applicant Feldman presented his federal claims to the state-equivalent court was hardly conducive to persuade that court to even consider, much less sustain them. Feldman, 460 US at 466-8. In fact, we interpret the message as a veiled threat that "If this court won't give us what we seek, we will go to federal court." Plainly, messages of this nature do nothing to foster comity and good relations.

[16]The Supreme Court there declared: (1) Younger abstention cannot be invoked if the state fails to provide adequate machinery to urge federal claims. However, the presumptions are in favor of the state. Id. 431. (2) Abstention is required unless state law clearly bars federal claims. Id. 432. (3) The inquiry is whether state proceedings afford an adequate opportunity to raise constitutional claims. Id. (4) So long as constitutional claims can be determined in state proceedings, the federal courts should abstain. Id. 435. (5) The Middlesex respondent failed to even attempt a constitutional challenge in the state proceedings. Id. (6) Abstention is based on the theory that the individual should first set up his defense in state court. Id. (7) Any doubt that the Middlesex respondent had an insufficient opportunity to present his challenges was laid to rest by changes in state

415, 23, 26, 30 (79); *Gibson v Berryhill*, 411 US 564, 77 (73). Most recently, this Court has declared " '[A] necessary concomitant of *Younger* is that a party (wishing to contest in federal court the judgment of a state judicial tribunal) must exhaust his state appellate remedies before seeking relief in the District Court.' " *New Orleans PS v NO*, 109 SCT 2506, 18 (1989) (quoting *Huffman v Pursue*, 420 US 592, 608 (75)). Petitioner Howell has done no more than *Middlesex*, *Texaco IV*, and *Feldman* implicitly required—to assert his federal claims in the state forum in the hope that the state would honor them and render it unnecessary for him to recourse the federal court. He may not be penalized for following these decisions. Otherwise, the Feldman window is no more than a delusion and a snare, and is, to the plaintiff, in practical effect, a non-entity.

The Courts below ruled in effect that although the Feldman window exists, it is a barred window, serving no practical purpose. A former state litigant who did not exhaust his state remedies has "forfeit[ed] his right to obtain review . . . in any federal court." *Feldman*, 460 US at 484 n.16. However, if the litigant has exhausted, his actions have barred the window; the case must be dismissed because "inextricable intertwine[ment]" has ousted the federal court of jurisdiction (PA 10) that would otherwise be available.

Surely, Congress did not intend that the jurisdiction statute should operate in this manner. The Supreme Court, in recognizing the Feldman window, did not intend to perform a vain act or provide an illusory remedy. Jurisdictional preclusion must be accommodated to the Feldman window, to make that express right of federal recourse meaningful.

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procedure pendente lite. Id. 436. (8) The case differs from Steffel v Thompson, 415 US 452, 63 (74) where there was no ongoing state proceeding. Id. n.14. (9) The conclusion: The state provided an adequate opportunity to raise federal issues; the federal district court correctly abstained. Id. 437.

Unfortunately, *Feldman* did not go forward and discuss the application of preclusion concepts to the window, and for such purpose, the writ should issue.

Jurisdictional preclusion is not, in practice, as monolithic as the Courts below considered. In *Sosna v IA*, 419 US 393 (75), the case had been previously litigated in state court; the Supreme Court brushed preclusion questions aside stating that they were not properly raised. However, it is fundamental that jurisdictional questions must be noticed by a court on its own motion. Apparently, the Supreme Court did not consider jurisdictional preclusion to apply, otherwise Rooker-type preclusion would have forced the Court to dismiss.[17] *See also Ellis v Dyson*, 415 US 452 (74). (Supreme Court approved re-litigation of state judgment).

Henry v Bank, 595 F2d 291,8 (5-MS 79) (state court defendant granted federal injunction against enforcement of state judgment being appealed through state system) was quite comparable to *Texaco II*. However, the *Henry* defendants did what petitioner Howell did and what the Supreme Court criticized Texaco for failing to do; they exhausted their state remedies before approaching the federal district court. Clearly, *Henry*'s course better preserves comity and conserves federal resources. On the other hand, the decision below implicitly declares the *Henry* injunction without jurisdiction and void.

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[17] Neither can we accept Atlantic Coast v Engrs., 398 US 281 (70), heavily relied on in Feldman, as a truly jurisdictional authority. The Supreme Court there held state and federal jurisdiction "concurrent." Id. 295, citing England. Could that federal injunction have been collaterally attacked as void, the ultimate test of jurisdiction? Clearly not! In our view, Atlantic is a comity declaration, comparable to Younger and Feldman, which however, cannot be labeled as an abstention case because the principle of deferred adjudication was absent. See 70 NWLR @880 n.121 re: Atlantic.

> If *Younger* principles continue to expand and if broad res judicata effect is given to state court judgments, then the promise of the Civil Rights Act that one with a constitutional grievance shall have his *choice* of federal court or state court will become empty. . . .
>
> If relitigation in habeas corpus after exhaustion of state remedies is permissible, then relitigation in a Civil Rights Act suit should also be permissible. As it becomes increasingly difficult to avoid state court litigation, . . . only full relitigation in federal court will preserve the element of choice embodied in the 1871 Act. . . .
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> . . .
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> *This concern* [expressed in England] *should be equally great where the abstention is of the Younger variety.* . . . The federal courts clearly have a congressional mandate to hear suits for deprivations of civil rights. Expansion of *Younger* abstention . . . must be tempered through a restrained application of res judicata principles. *England* suggests that the Court will follow a middle road: allowing initial state resolution but retaining a final check.

Theis, *Res Judicata*, 70 NWLR 859, 870-875 (76).[18]

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[18] Respondents might argue as a fall-back position that petitioner should have simply filed an England reservation in the state court. However, State Bar I, 674 F2d at 1027 declares an England reservation insufficient in Younger cases; it accomplishes nothing. We also think there is a practical difference:

> A. Pullman abstention is selective; a deliberately chosen remedy. In a Pullman case, the federal action has commenced, the court has conducted proceedings and has found arguable grounds for federal relief. However, it finds a state issue that should be answered by the state court. Reference is a considered act within the

Recap: Younger Abstention Requires Exhaustion

As presented under "Summary of Argument," the intent of Congress is the key; it intended a meaningful Feldman window. *Middlesex*, *Feldman* itself, and *Texaco II* all insist that the Feldman window litigant first exhaust by presenting his federal claims to state court. If the Feldman window is to be accommodated to the demands of *Younger*, it must be held that Congress did not intend for jurisdictional preclusion to barricade the Feldman window and thereby create an illusory remedy.

QUESTION 2: The Texas Supreme Court Order Was Void

Petitioner's alternate ground, the constitutionally-void-for-want-of-jurisdiction ground was addressed but cursorily by the Fifth Circuit; the Trial Court addressed it not at all. It is an independent ground, separate from petitioner's Feldman window attack on the Texas rule. *It would exist even if Texas Rule 15a* page 1 *supra, had never been adopted.*

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discretion of the federal judge who retains jurisdiction and resumes the trial upon receipt of the state determination. In that circumstance, notice to the state of the pendency of the federal case is ample because the federal judge affirmatively does not expect the state judge to answer the federal issues; he has already decided that he will answer them.

B. Younger abstention is automatic abstention, covering an entire class of litigation; it does not spring from the specific ruling of a federal judge; it emanates from a rule of law, applying to cases that have never been before the federal court. Where a case is in federal court and it determines that Younger abstention is required, it goes no further. The federal plaintiff is entitled to return if he fails to obtain relief in state court, but his return is not expected, as with Pullman abstention. Younger, in contrast with Pullman, is designed to minimize federal participation in areas predominantly committed to the state courts. The would-be federal plaintiff is urged to first seek complete relief before invoking the federal forum. Those who desire a federal forum, but are subject to Younger abstention, may not have one simply by giving notice to the state court; notice alone will not fulfill the objectives of comity and federalism. Younger requires that those who seek the federal forum must earn it by showing diligence—that while in state court, they actively sought relief on their federal claims and were unsuccessful.

Federal Jurisdiction of Void Orders—Overview: (1) A motion to dismiss for want of jurisdiction is a general demurrer. All facts well pleaded are deemed true; the court decides if it has power to grant relief. (2) A fair and impartial tribunal is a fundamental due process right. (3) For demurrer purposes, it must be assumed that the alleged disqualification of the Texas justices did, in fact exist. (4) It was alleged to be of federal constitutional proportions; that also must be accepted. (5) Both under Texas law and under the due process authorities herein, the act of a disqualified judge is a nullity and may be collaterally attacked *in any court.* (6) The Rooker-Feldman rule has no application to void judgments; plainly, the contrary ruling of the Fifth Circuit is erroneous. *See "Summary of Argument, 2nd Question;"* also footnote 21. (7) Therefore, the District Court below had jurisdiction to hear the void-judgment claim.

An Impartial Tribunal Is Fundamental: The due process right to a fair and unbiased court is well established. A leading authority: *In re Murchison,* 349 US 133 (55) (Where, under Michigan law, a judge functions as a one-man grand jury and he charges a witness with contempt for refusing to testify, the judge-accuser is disqualified to conduct the trial.)[19]

The circumstances are myriad but the rule is clear—the court must be impartial in fact; it must also appear to be impartial. *Mayberry v Pennsylvania,* 400 US 455 (69); *Taylor v Hayes,* 418 US 188 (74).

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[19] A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the possibility of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."
Id. at 138.

Tumey v Ohio, 273 US 510 (27), (Judge of misdemeanor court paid only through collection of court costs. Held, due process denied.) declared that every circumstance which offers temptation to forget the burden of proof denies due process. *Id.* 532. *Accord: Ward v Monroeville*, 409 US 57 (72); *Connally v Georgia*, 429 US 245 (77); *Commonwealth v Continental*, 393 US 145 (68); *Gibson v Berryhill*, 411 US 464 (73).

The first and only Supreme Court case on appellate disqualification: *Aetna v Lavoie*, 475 US 813 (86) (Alabama justice wrote opinion upholding punitive damages against insurance carrier; such justice was, at the time, name-plaintiff in class action seeking punitive damages from unrelated carrier, unrelated claim. Held disqualified; reversed.) Although he had no pecuniary stake in the case before him, his possible economic gain from the precedent being declared was sufficient.

The latest case in point: *Liljeberg v Health Services*, 108 SCT 2195 (88). Although the statute relating to federal judges was a turn-point, the Court pointed out that the integrity of judges "has constitutional dimensions" quoting *Lavoie*, a state case, discussing *Tumey*, *Murchison* and *Ward*, all state cases. *Liljeberg* at n.12.

The Judgment Is Void Where Due Process Fundamentals Have Been Denied: The seminal case on constitutionally void judgments: *Pennoyer v Neff*, 95 US 714 (1878).[20] *Bass* and *O'Boyle*, footnote cites below, were subject to collateral attack for failure to meet fundamental due process

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[20] Other cases in point: Atchison v Wells, 265 US 101 (24); Griffin v Griffin, 327 US 220 (46); Hansbury v Lee, 311 US 32 (40); Postal Telegraph v Newport, 247 US 464 (18); Hovey v Elliott, 167 US 409 (1897); Wetmore v Karrick, 205 US 141 (07); and Old Wayne v McDonough, 204 US 8 (07).

Fifth Circuit cases: Bass v Hoagland, 172 F2d 205 (5-TX 49) (Judgment held void because offended party deprived of jury trial); O'Boyle v Bevel, 259 F2d 506 (5-TX 58) (Judgment taken before appearance date void for want of due process even though Texas law would hold otherwise).

minimums. Petitioner makes the same challenge: the lack of an impartial tribunal, declared fundamental by the *Murchison* line, resulted in a void judgment. Recent cases: *Felhaber v Felhaber*, 681 F2d 1015, 27-29 (5-FL 82); *ALT v SBA*, 801 F2d 1451 (5-TX 81); *US v Truckee*, 649 F2d 1286, 1303 (9-NV 80). *See*, in particular, *Rhoades v Penfold*, 694 F2d 1043 (5-TX 83) (suit against Texas judiciary for terminating parent-child relation while parent indigent, without counsel), where the judgment was held "null and void."[21]

Texas Has Long Held the Action of a Disqualified Court Absolutely Void: *Buckholts ISD v Glaser*, 632 SW2d 142,6 (TXSM 82); *Fry v Tucker*, 202 SW2d 218, 21 (47); *Templeton v Giddings*, 12 SW2d 851 (TXSM 1889); *Stephenson v Kirkman*, 297 SW2d 265,7 (TXCVAP 27). Disqualification can be raised at any time. *Nalle* at 963.

Texas Has Attempted to Classify Disqualifications: Texas authorities, including those above, have historically held that bias and prejudice is *not* a disqualification. However, at least since *Murchison*, the rule will not pass constitutional muster. Responding to the 14th Amendment, Texas has recognized additional grounds for the withdrawal of tainted judges. However, *Buckholts* declared that only *Texas* constitutional disqualification causes a void judgment; so-called "statutory" disqualification was held waivable and, lacking a timely objection, the right to complain lost. Plainly, the *Buckholts* "statutory" disqualification is, in fact, 14th Amendment disqualification.

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[21] We submit that the Rhoades discussion of Rooker, was misplaced—similar to the error of the Circuit Court below—see "Summary of Argument, Second Question." Rooker has nothing to do with void-judgment attacks. The Pennoyer line is the controlling authority. Rooker v Feldman presumes a valid and enforceable, although erroneous judgment. The distinction is well established. Pennoyer, Murchison, Bass, and Penfold require a holding that the Texas justices were without jurisdiction to render a valid judgment. Petitioner's case remains undisposed on the docket of that court. Thus, he is free to assert its voidness in federal court.

Thus, Texas has recognized Fourteenth Amendment grounds but *through its case law*, particularly *Buckholts*, it has declared their application discretionary; this it may not do. The attempted classification is constitutionally repugnant; disqualification under the state and federal constitutions must produce an equal result.

Procedures for relief from *federal* constitutional disqualification, more onerous than those available from *state* constitutional disqualification, constitute an invidious discrimination. Texas cannot apply the abuse of discretion rule to federal disqualification only.

For demurrer purposes, the respondent Texas justices were under an impediment. Neither any affected justice nor the Court was possessed of any discretion in deciding if any of them should withdraw. Even though the impediment springs from the federal constitution, the result must be equal; each affected justice must step down. The further participation by one or more affected justices *(See Lavoie*, particularly concurring opinions) rendered the Texas court's actions void and subject to collateral attack.

QUESTION 3: Sanctions Were Not Proper

The Fifth Circuit brushed off the sanctions issue merely stating "[T]he district court did not abuse its discretion. (PA 13)." We submit that the abuse of discretion standard is entirely improper.

The right of petition is guaranteed by the First Amendment. *United Mine Wrkrs. v IL*, 389 US 217 (67); *Brotherhood of RR Trainmen v VA*, 377 US 1 (64); *NAACP v Button*, 371 US 415, 429-39 (63). Although few rights are absolute, it is settled that First Amendment rights may not

be stifled. They must have growing room. Any procedure that threatens to make a First Amendment right "costly" must be carefully circumscribed.

Many people who enter the courts are unpopular and unliked; they may be affiliated with groups that the community disdains; and which it may even regard as dangerous. Those appearing in court can be litigious, querulous, argumentative, and even obnoxious. *The Constitution must guard the rights of the unpopular;* the popular need no protection. Inasmuch as sanctions are in derogation of a protected right, punishment may not be imposed unless the conduct so far departs the accepted norm as to threaten the system itself. Nothing approaching this type of misconduct has been shown. On account of their chilling effect, the sanctions must be set aside.

Because sanctions impinge upon a cherished right, maximum safeguards are mandated. It follows that a sanctioned party must have plenary review; this most subjective of remedies may not be imposed by a single judge and thereafter insulated by a limited review standard. Plenary review is mandatory.

Plenary review is particularly appropriate where, as here, the Trial Court's ruling was, almost purely, a ruling upon the law. The primary if not the exclusive basis for sanctions was a perceived lack of jurisdiction; jurisdiction is a question of law. The Trial Court upbraided petitioner for relying on *Texaco II* (characterizing it as *Texaco I*), declaring it "factually distinguishable . . . because [petitioner] . . . chose to raise his . . . challenges in the state action (PA 20)." However, the court failed to note that the Supreme Court later reversed *because* Texaco had not raised its federal claims in state court. Certainly, the law was such that

petitioner presented an arguable case. If so, the First Amendment is a bar to punishment for presenting that argument.

Whether a legal claim is frivolous and wholly untenable is a question of law. The ultimate reason for the existence of appellate courts is to declare the law and see that it is correctly applied. For such reason, trial court rulings upon the law are never accorded any presumptions of correctness; they must be weighed de novo. *Medical Fund v Heckler*, 804 F2d 33,6 (3-PA 86). For certain, nothing less is acceptable when the First Amendment is implicated.

We read the Fifth Circuit as interpreting the Trial Court to have found vile motives on petitioner's part, which the Trial Court assertedly viewed as a free-standing, independent grounds for punishment. Petitioner urges that the record will not fairly support any such finding.[22] Furthermore, it is basic to our jurisprudence that the law does not punish for vile motive; *it punishes for unlawful conduct.* Even more so where the First Amendment is implicated, vile motive, standing alone, the most subjective of all human evaluations, can furnish no basis for punishment.[23]

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[22]Space limits us to a single example: The Trial Court criticized a 1986 lawsuit which petitioner brought against the respondent justices. The state proceedings are Wallace v Howell, 707 SW2d 876 (TXSM 86); most of the Fifth Circuit proceedings were exhibits in the Trial Court (Texas Supreme Court "Motion for Recusal" at R.783-7; federal complaint at R791-806; opinion of Fifth Circuit on application for injunction at R841-2). It appears that the 1986 suit played a large part in the Court's findings of vile motive. The Court prominently discussed the 1986 suit (PA 25-6) and concluded, "If Howell had a sincere interest in challenging . . . the recusal statute [sic] . . . he would have pursued the previous litigation . . ." (PA 28).

However, the 1986 action did not attack TXRAP 15a (text, supra, p.1) (there is no recusal statute). It sought to invalidate certain election statutes, TX ELEC C secs 141.003; 141.033. The Court's findings of vile motive were based, at least in part, upon a misapprehension of the elemental facts.

[23]The third ground for punishment, according to the Fifth Circuit evaluation of the District Court opinion, was the fact that petitioner applied for a preliminary injunction to freeze the Homecraft state supersedeas fund, pending determination of petitioner's

CONCLUSION

For the reasons given, a writ of certiorari should issue.

Respectfully submitted,

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federal claims, such application being, in the District Court's view, without sufficient evidence of irreparable injury (PA 29).

The federal plaintiff in Texaco I sought very similar relief, a preliminary injunction to restrain the collection of a state judgment pendente lite. Most certainly, petitioner Howell was armed with direct authority that the relief sought was a proper subject for a federal injunction.

The Texaco I court chose to grant the injunction whereas our Trial Court chose to deny. However, such is not the test for sanctions; discretionary relief was involved. By the same measure, an application for a preliminary injunction is not punishable unless the applicant is asking the court to grossly exceed its discretionary powers. Petitioner did not present evidence of irreparable injury comparable to Texaco I, but neither did he ask relief of the same scale. Petitioner had already made a deposit sufficient to pay the state judgment with money over; the fund was earning interest. Certainly, the Trial Court had the discretion to balance the equities and preserve the status quo if it so chose. Again pointing out the First Amendment implications, we submit that such determination prohibits punishment for the attempted exercise of the right of petition.

Appendix

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No. ____

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES BEN HOWELL *Petitioner*

VS.

THE SUPREME COURT OF TEXAS, ET AL.
Respondents

PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT; CHARLES BEN HOWELL, ET AL. V. THE SUPREME COURT OF TEXAS, ET AL., NO. 89-1032, Summary Calendar; October 11, 1989.

[OPINION; 885 F.2d 308]

Before REAVLEY; KING and JOHNSON, Circuit Judges. REAVLEY, Circuit Judge:

Appellant Charles Ben Howell brought this §1983 action seeking declaratory and injunctive relief. The district court concluded that Howell had already litigated his claims in state court and dismissed for lack of jurisdiction. The district court assessed attorneys' fees and expenses against Howell and his attorney as Rule 11 sanctions.

In this appeal, Howell asserts that the district court erred in concluding that it did not have jurisdiction under the *Rooker-Feldman* doctrine. Alternatively, Howell argues that the court should have exercised jurisdiction because the state court proceedings failed to comply with the fundamental requirements of due process and the results of those proceedings were therefore void and subject to collateral attack. Finally, Howell and his attorney argue that the district court should not have imposed Rule 11 sanctions.

I.

This action arises out of Texas state court proceedings in which Howell, as plaintiff, suffered an adverse jury verdict and judgment. A jury finding that Howell brought his Texas Deceptive Trade Practices Act claims in bad faith resulted in the awarding of attorneys' fees to the defendants. Howell appealed the judgment to the Fifth District Court of Appeals of Texas. Because Howell was a judge on that court, the normally seated judges recused themselves. A specially appointed panel was convened and affirmed the judgment and

imposition of attorneys' fees against Howell.

Howell next applied to the Texas Supreme Court for a writ of error. In connection with that application, Howell filed a motion requesting that each of the justices recuse themselves, or in the alternative, be disqualified. Howell's motion was accompanied by an affidavit that he claimed indicated either that the justices "harbor[ed] a personal bias or prejudice toward" Howell or "that the impartiality of . . . [the] justices might reasonably be subject to question." Howell based his recusal/disqualification motion on Rule 15a[1] of the Texas Rules of Appellate Procedure and on the due process clause of the Fourteenth Amendment. Howell's motion further provided:

> In this connection, petitioner would show that R.15a(1) sets forth the standards for the withdrawal from a case of a judge or justice pursuant to the

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[1] Rule 15a provides:

> (1) Disqualification. Appellate judges shall disqualify themselves in all proceedings in which:
>
> (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law (except in the context of a district or county attorneys office) served during such association as a lawyer concerning the matter; or
>
> (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or
>
> (c) either of the parties may be related to them by affinity or consanguinity within the third degree.
>
> (2) Recusal. Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Tex.R.App.P. 15a

> disqualification or recusal provisions of the Texas Constitution, Art. V, Sec. 11, whereas R.15a(2) undertakes to set forth the standards for recusal or disqualification of judges pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Insofar as the said rule purports to establish less onerous requirements for an offended party to secure recusal or disqualification grounded upon the State Constitution than the requirements imposed in order to secure recusal or disqualification grounded upon the Constitution of the United States, said Rule 15a is unconstitutional as repugnant to the Due Process and Equal Protection Clauses of the United States Constitution. If such be necessary, petitioner challenges the said R.15a on the grounds of invidious discrimination.

The Texas Supreme Court denied Howell's motion to recuse or disqualify. A subsequent motion seeking the recusal or disqualification only of the chief justice was also denied. The court then denied Howell's application for writ of error and his motion for rehearing.

Howell eventually filed a petition for writ of certiorari in the United States Supreme Court seeking review of the Texas Supreme Court's denial of his motion to recuse or disqualify. In his petition, Howell alleged that the denial of

his motion violated his constitutional right to due process of law. The Supreme Court denied the petition.

In the present action, which Howell initiated prior to filing his certiorari petition, Howell asserts two grounds for relief. First, Howell challenges the constitutionality of Rule 15a of the Texas Rules of Appellate Procedure.

> 22. The said Rule 15a is unconstitutional as repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it purports to establish less onerous requirements for an offended party to secure the removal of an appellate judge from his case grounded upon the provisions of the Texas Constitution, Article V, Section 11 than when the removal is sought pursuant to the Constitution and Laws of the United States.
>
> 23. The aforesaid classification that said Rule 15a attempts to establish is unconstitutional and void. Inasmuch as Defendant justices attempted to act pursuant to said classification and purported to act pursuant to the classification more onerous to Plaintiff, the acts of the said justices in refusing to remove themselves from Plaintiff's case was and is unconstitutional and void. If such be necessary, Plaintiff pleads the said Rule as containing an

invidious classification against the Plaintiff.

Second, Howell asserts that the state court judgment is void and subject to collateral attack. In substance, his claim is that the justices' refusal to recuse themselves was a due process violation.

> 25. It has been a well settled principle at least since *Pennoyer v. Neff*, 95 U.S. 714 [24 L.Ed. 565] that any judgment entered in a manner that fails to comply with fundamental due process principles is void and may be collaterally attacked in another court, either state or federal. On account of the lack of fairness and impartiality, both in fact and in appearance, all pleaded herein, the judgments and orders of the Texas Supreme Court were entered in violation of fundamental due process concepts. The same are void, or alternatively, are not immune from collateral attack.

The district court noted that these bases for relief were the same as those Howell asserted in his state court action and held that the only permissible means of challenging the state court disposition in a federal forum was by appeal or writ of certiorari in the Supreme Court. Accordingly, the court dismissed for lack of jurisdiction.

II.

Federal district courts have no authority to review the final determinations of a state court. Review of such determinations is only available in the United States Supreme Court on direct appeal or by writ of certiorari. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970). This principle has been well established since 1923, when in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), the Supreme Court held:

> Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment [of a state's highest court that decided federal constitutional issues]. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Id. at 416, 44 S.Ct. at 150 (citations omitted). More recently, this court held that a party " 'aggrieved by a judicial decision of a state's highest court [may not] invest a lower federal court with . . . jurisdiction by clothing his or her grievance in the garb of §1983 and alleging that the decision of the state court

deprived him or her of constitutionally protected rights or interests.' " *Carbonell v. Louisiana Dep't of Health & Human Resources*, 772 F.2d 185, 188 (5th Cir. 1985) (quoting *Dasher v. Supreme Court of Texas*, 650 F.2d 711, 714-15 (5th Cir.) *rev'd on other grounds*, 658 F.2d 1045 (5th Cir. 1981)).

All parties to this proceeding agree that Howell presented the claims he raises in this proceeding to the Texas Supreme Court and that the court decided those claims against him. The precedents cited above indicate that Howell's only means of challenging the state court's rulings was by writ of certiorari in the United States Supreme Court. Howell did in fact apply for a writ of certiorari alleging a violation of the due process clause, and that writ was denied. Howell may not now reopen his challenge in a new proceeding in federal district court.

Howell, however, asserts that this proceeding comes within an exception to the line of cases prohibiting federal district court review of a state court's final decision. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the Supreme Court recognized a distinction between a challenge in a particular case to a state court's interpretation and application of a rule or statute and a general challenge to the constitutionality of the rule or statute. Applying that distinction in *Feldman*, the Supreme Court held that although the plaintiffs could not challenge in federal district court the District of Columbia District Court of Appeals' final judgment in a bar admission

case, the plaintiffs could challenge the validity of a state bar admission rule. *See Feldman*, 460 U.S. at 483-87, 103 S.Ct. at 1315-17. Howell asserts that he is mounting a general challenge to Rule 15a of the Texas Rules of Appellate Procedure and that his claim in federal court comes within the *Feldman* exception to the *Rooker* line of cases. We disagree.

In *Feldman* the plaintiffs in the federal district court had not raised the constitutional challenge to the bar rule in the District of Columbia Court of Appeals.[2] As the district court in the present case noted, this case differs in that Howell did present both his constitutional challenge to Rule 15a and his due process concerns to the Texas Supreme Court. The *Feldman* exception does not apply when a constitutional claim has already been decided by the state court. The court in *Feldman* noted:

> Challenges to the constitutionality of state bar rules . . . do not *necessarily* require a United States district court to review a final state-court judgment in a judicial proceeding. . . . United States district courts . . . have subject-matter jurisdiction over general challenges to state bar rules, promulgated by

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[2] Howell suggests that the constitutional challenges were in fact presented to the District of Columbia Court of Appeals. A close reading of the case, however, indicates that although counsel for Feldman did raise the constitutional concerns in a letter to the court, Feldman did not ask the court to invalidate the bar admission rule in question. See Feldman, 460 U.S. at 465-470, 475, 103 S.Ct. at 1305-08, 1311.

> state courts in nonjudicial proceedings, *which do not require review of a final state-court judgment in a particular case.*

Feldman, 460 U.S. at 486, 103 S.Ct. at 1316 (emphasis added). Because Howell did raise his claim in the state court, allowing a new challenge in federal district court would necessarily require review of a final state court judgment. The *Feldman* analysis does not allow federal court adjudication in this case.

Howell argues that the litigation in state court of a general constitutional challenge to a state court rule does not prevent a party from raising the same challenge in a later federal court proceeding. Howell's analysis is erroneous, as the previous discussion indicates. Further, *Feldman* also precludes litigation of a constitutional claim that, although not explicitly raised in a state proceeding, is "inextricably intertwined" with a state court decision. *See Feldman*, 460 U.S. at 482 n. 16, 103 S.Ct. at 1314-15 n. 16. Although Howell frames his claim in this proceeding as a challenge to Rule 15a, the substance of the claim is that the justices' interpretation of the rule and refusal to recuse themselves under it violated Howell's due process rights. The due process issue was explicit in Howell's motión to recuse and was necessarily rejected by the justices in denying his motion. Howell's challenge in this proceeding thus is inextricably intertwined with the Texas Supreme Court's denial of his recusal/disqualification motion, and this challenge is prohibited. *See Phinizy v. Alabama*, 847 F.2d 282, 284 (5th Cir. 1988).

As an alternative ground of jurisdiction, Howell asserts that the district court could adjudicate his claims because the state court judgment was void for want of jurisdiction. Howell explained his argument in "Plaintiff's Preliminary Injunction Brief" filed in the district court.

> A judgment that fails to comply with the fundamental requirements of due process is a void judgment and it may be attacked in any form where its validity may be drawn in issue. This has been the rule, at least since *Pennoyer v. Neff*, 95 U.S. 714 [24 L.Ed. 565] (1986).
>
> It is well established, at least in Texas, that the judgment of a disqualified judge is wholly void, of no effect and subject to collateral attack. The attempt by the state court to withdraw from this rule those disqualifications arising under the United States Constitution, as opposed to those arising under the state constitution, is in violation of the Fourteenth Amendment.
>
> It follows that the federal court has subject matter jurisdiction to proceed to the merits of the alleged disqualification and to enjoin the enforcement of the judgment in issue until Plaintiff has been afforded appellate review before a tribunal not disqualified to hear the appeal.

Howell's explanation of his jurisdictional theory clearly indicates that he is merely asserting another variation of his contention that the Texas Supreme Court justices' refusal to recuse or disqualify themselves rendered the state court proceedings violative of the due process clause. Again, this contention was clearly presented to and rejected by the justices and then presented to the United States Supreme Court by petition for writ of certiorari. Howell may not now renew his challenge in federal district court. To permit such a challenge would be to permit the type of review the Supreme Court rejected in *Rooker*, *Atlantic Coast Line*, and *Feldman*.

The cases Howell cites in his brief in support of his jurisdictional theory are not to the contrary. A majority of those cases involve proceedings in which the due process challenge was raised for the first time in a collateral attack on a judgment entered by a court without jurisdiction over the person suffering the adverse judgment. The remainder involve other due process challenges raised for the first time on collateral attack. Here, Howell was subject to the jurisdiction of the Texas Supreme Court, he did raise his due process challenge, and it was resolved against him. He may not again assert his challenge in this collateral proceeding.

III.

Howell and his attorney challenge the district court's imposition of attorney's fees and expenses as Rule 11

sanctions. In its order dismissing the case, the district court gave three justifications for the imposition of sanctions. First, the court found that by filing a suit over which the court did not have jurisdiction, "Howell and his attorney violated Rule 11 by filing a suit which does not embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law." Second, the court concluded that Howell brought the action for purposes of harassment and delay. Finally, the court concluded that Howell's motion for an injunction against execution of the state court judgment did not "embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law, at least to the extent that it contend[ed] that Plaintiff will suffer irreparable harm in the absence of an injunction."

We review the imposition of sanctions under an abuse of discretion standard. *See Thomas v. Capital Sec. Serv.*, 836 F.2d 866, 871-73 (5th Cir. 1988) (en banc). The district court detailed the basis for the imposition of sanctions in the order of dismissal. Given our conclusion on the jurisdiction issue and the history of this litigation as set forth in the district court record, we conclude that the district court did not abuse its discretion.

AFFIRMED.

UNITED STATES DISTRICT COURT, Western District of Texas, Austin Division; Charles Ben Howell v. The Supreme Court of Texas, et al.; Civil No. 88-CA-644; November 18, 1988.

[ORDER AND OPINION; UNPUBLISHED]

[NOWLIN, District Judge:]

Before the Court are the following motions:

(1) Motion to Dismiss of Defendants' Supreme Court of Texas, the Members and Justices Thereof and the State of Texas, filed August 26, 1988;

(2) Defendants Homecraft Land Development, Inc.'s and U.S. Home Corporation's Motion for Sanctions, filed on September 13, 1988;

(3) Defendant Justice Oscar Mauzy's Motion for Rule 11 Sanctions, filed on September 16, 1988;

(4) Defendant Stewart Title Company's Motion to Dismiss, filed on September 20, 1988;

(5) Motion for Leave to File Defendants Homecraft Land Development, Inc.'s and

U.S. Home Corporation's Reply to Plaintiff's and Ken E. Mackey's Response to Motion for Sanctions and Plaintiff's Supplemental Brief in Support of Plaintiff's Response to Motion to Dismiss, filed on October 7, 1988; and

(6) Defendant Justice Oscar Mauzy's Motion to File Original Deposition, filed October 24, 1988.

The Court has reviewed these motions and their supporting briefs, as well as responses and replies thereto. The Court has also reviewed the affidavits submitted in conjunction with the requests for sanctions pursuant to Federal Rule of Civil Procedure 11.

This suit arises out of a state court action filed on April 8, 1983, in Dallas County district court, by Charles Ben Howell against Homecraft Land Development, Inc. (Homecraft), U.S. Home Corporation (U.S. Home), and Stewart Title Company. This state court suit ("the *Homecraft* suit") involved Howell's April 1981 sale of real property to U.S. Home. The trial court directed a verdict on some issues, and the jury resolved all other issues in favor of the defendants. The jury found that Howell brought his Deceptive Trade Practices Act (DTPA) causes of action in bad faith, and found attorney's fees incurred in relation to the DTPA cause of action to be $75,000.00. The trial court entered judgment on behalf of the Defendants, and awarded Homecraft and

U.S. Home attorney's fees in the amount of $87,000.00 ($75,000.00 for the DTPA causes of action, and $12,000.00 for a declaratory judgment cause of action.)

On appeal to the Fifth Court of Appeals, the normally seated judges recused themselves, and a specially convened panel affirmed, reducing attorney's fees to $75,000.00. Howell then moved to have all of the Texas Supreme Court justices recuse themselves. The motion was denied on February 1, 1988, under Texas Rule of Appellate Procedure 15a(2). A second motion for recusal or disqualification was denied on April 20, 1988. On April 27, 1988, the Supreme Court of Texas denied Howell's application for writ of error, and on June 1, 1988, denied his motion for rehearing.

On August 9, 1988, Charles Ben Howell filed his complaint in federal court pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Declaratory Judgments Act, 28 U.S.C. §2201. In his prayer for relief, Howell requests the Court to: (1) issue a temporary restraining order and a preliminary injunction forbidding the Dallas County District Clerk from disbursing the supersedeas bond deposited in conjunction with the state court suit; (2) hold that Texas Rule of Appellate Procedure 15a, and the actions taken by the Texas Supreme Court and its justices are unconstitutional and void; (3) hold that the Texas Supreme Court's action taken upon Plaintiff's motion for recusal or disqualifications and all subsequent actions of the Texas Supreme Court in the state

court suit are unconstitutional and void; (4) require the Texas Supreme Court and its justices to set aside every order entered by them in the case; (5) require the Texas Supreme Court justices to certify to the Governor of Texas that they are prohibited by the United States Constitution and laws from sitting in review of Plaintiff's state court case; and (6) require the Texas Supreme Court justices to facilitate Plaintiff's application for writ of error in the state court suit being brought before specially appointed justices for resolution.

I. MOTIONS TO DISMISS

Defendants contend that this Court lacks jurisdiction under the Rooker-Feldman doctrine, which provides that federal district courts cannot sit in direct review of state court decisions. Review may only be had in the United States Supreme Court. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The Supreme Court has clearly articulated this rule:

> The [Circuit] properly acknowledged that the United States District Court is without authority to review final determinations of the [highest court of a state] in judicial proceedings. Review of such determinations can be obtained only in this Court. See U.S.C. §1257. See also *Atlantic Coast Line R. Co.*

v. Locomotive Engineers, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416, 44. S.Ct. 149, 150, 68 L.Ed. 362 (1923).

Feldman, 460 U.S. at 476. The Court further stated:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

Id. at 482 n.16.

Plaintiff acknowledges the Rooker-Feldman doctrine, but argues that the cause of action raised in this federal lawsuit are not "inextricably intertwined" with the state court actions. In support of his argument, Plaintiff cites *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1143-45 (2d Cir. 1986) (*Texaco I*), which he acknowledges was unanimously reversed by the Supreme Court in *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. 1519 (1987) (*Texaco II*). Plaintiff notes, and the Court agrees, that the Supreme Court's reversal was not based upon the Circuit's discussion of the Rooker-Feldman

doctrine, but upon application of abstention principles articulated in *Younger v. Harris*, 393 U.S. 1013 (1968). In fact, five of the justices indicated agreement with the Second Circuit's determination that the Rooker-Feldman doctrine did not bar Texaco from proceeding on its claim in federal district court. *See Texaco II*, 107 S.Ct. at 1529-30 (Scalia and O'Connor, J., concurring); *id.* at 1531 (Brennan, J., concurring in judgment); *id.* at 1534-35 (Blackmun, J., concurring in judgment); *id.* at 1536 n.3 (Stevens, J., concurring in judgment).

The relevant portion of the Texaco litigation began on December 10, 1985, when Texaco filed its complaint in the Southern District of New York. The complaint alleged that the Texas judgment and enforcement of the judgment, through use of Texas lien and supersedeas bond provisions, would violate Texaco's rights under the Commerce, Supremacy, Full Faith and Credit, Due Process, and Equal Protection Clauses of the United States Constitution. Texaco also claimed violations of the Civil Rights Act of 1871, 42 U.S.C. §1983, the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.*, and Rules promulgated by the S.E.C. under the latter act. *Texaco I*, 784 F.2d at 1136-37.

The Second Circuit determined that Texaco's due process and equal protection claims were not barred by the Rooker-Feldman doctrine. *Id.* at 1144. The Circuit first rejected Pennzoil's contention that Rooker-Feldman should be read broadly to preclude federal review of issues which a

party could have raised in the state court proceeding, but chose to withhold from the state court. The Circuit noted that Pennzoil's theory would read 28 U.S.C. §1257 to severely impair, and perhaps negate, a litigant's right to gain relief under 42 U.S.C. §1983. The theory would thwart the statute's intent of permitting the litigant to choose either a federal or state forum. The Second Circuit noted that Texaco's due process and equal protection challenges to the Texas automatic and mandatory lien and supersedeas bond provisions had never been presented to or adjudicated by a state court. The Circuit also held that these claims were not "inextricably intertwined" with the barred claims, without explaining the meaning of "inextricably intertwined."

The problem with Howell's assertion of *Texaco I* as his "white horse" authority is that his federal case is factually distinguishable from Texaco's in a very important manner: unlike Texaco, Howell chose to raise his equal protection and due process challenges in the state action. The Second Circuit ruled that Texaco could pursue its equal protection and due process arguments in federal court because they had not been presented to or adjudicated by a state court, and they were not inextricably intertwined with the state court claims. That is simply not the case here.

In his Motion for Recusal or Disqualification filed with the Supreme Court of Texas in Cause No. C-7113, *Charles Ben Howell v. Homecraft Land Development, Inc., et al.*, Howell states:

3.

This motion is alternatively made pursuant to and is grounded upon the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. . . . In particular, petitioner relies upon those constitutional principles declaring that trial before a fair and impartial tribunal, a tribunal whose members are not only fair and impartial in fact, but fair and impartial in appearance, is a cornerstone of Due Process.

* * *

5.

. . . Insofar as [Rule 15a] purports to establish less onerous requirements for an offended party to secure recusal or disqualification grounded upon the Constitution of the United States, said Rule 15a is unconstitutional as repugnant to the Due Process and Equal Protection Clauses of the United States Constitution. If such be necessary, petitioner challenges the said R.15a on the grounds of invidious discrimination.

These are exactly the same challenges to the constitutionality of Rule 15a which Howell seeks to raise in this federal cause. Having already raised them in the state case, Howell's only

permissible federal forum is the United States Supreme Court. This Court is without jurisdiction under the "Rooker-Feldman" doctrine, and Howell's assertion that he fits within the Feldman window is without merit.

II. RULE 11 MOTIONS

All of the Defendants herein have requested that Howell be sanctioned pursuant to Federal Rule of Procedure 11 for having brought this lawsuit. Rule 11 provides, in pertinent part, as follows:

> The signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an

> order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11 applies to all papers filed in a suit, and not just to pleadings. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 870 (5th Cir. 1988) (en banc). Sanctions are mandatory if a violation occurs. *Id.* at 876-78. The Court maintains broad discretion in selecting the appropriate sanction, keeping in mind the purposes of Rule 11 and the policy of imposing the least severe sanction adequate to such purposes. *Id.* at 877-78. The Court is not required to make specific findings of fact and conclusions of law, but when the basis and justification for the ruling are not readily discernible in the record, an adequate explanation is necessary. *Id.* at 883.

Rule 11 imposes three separate affirmative duties on the person signing a paper filed with the Court. The attorney signing certifies:

> (1) that [he] has conducted a reasonable inquiry into the facts which support the document;
>
> (2) that [he] has conducted a reasonable inquiry into the law such that the document embodies existing legal principle or a good faith argument "for the

extension, modification, or reversal of existing law;" and

(3) that the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

Id. at 874. A violation of any of the duties constitutes a violation of Rule 11.

An attorney who made a reasonable inquiry into the law should have discovered that this Court is without jurisdiction to hear Howell's complaint. The Fifth Circuit recently indicated the appropriateness of Rule 11 sanctions being imposed when a suit of this sort is filed without jurisdiction. *Corpus Christi Taxpayer's Assoc. v. City of Corpus Christi*, No. 87-6141, slip op. at 265-66 (5th Cir. 1988). The only case which Howell cites as authority for this Court having jurisdiction despite the Rooker-Feldman doctrine is one that is factually distinguishable on a critical point: whether or not the plaintiff raised in the state court suit the constitutional issues which are the heart of his claim in federal court under 42 U.S.C. §1983. Accordingly, the Court finds that Howell and his attorney violated Rule 11 by filing a suit which does not embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law.

The Court is also concerned with violation of the third duty of not filing for purposes of delay or harassment. In his affidavit, Howell argues that each of the Texas Supreme

Court justices should have recused himself or herself from hearing his application for writ of error because of numerous personal and political run-ins which they have had with Howell. Howell also states that some justices had a pecuniary interest in the outcome of the *Homecraft* case. Among the run-ins that Howell noted in this affidavit are the following.

In January and February 1986, Howell was a potential opponent of Justice Oscar Mauzy for Place 1, and became an actual opponent of James P. Wallace for Place 3. On February 20, 1986, Justice Wallace filed suit against Howell in the Supreme Court of Texas, and Howell filed a suit against Wallace. Howell filed a motion for recusal in both of these cases, asking all then seated justices to recuse themselves, for reasons similar to those asserted by Howell in his Motion for Recusal or Disqualification in the *Homecraft* case. The Court, without hearing or opinion, overruled this motion on March 3, 1986. The Court then held a hearing on the cases on March 5, 1986, and rendered an opinion on March 12, 1986, removing Howell from the ballot for Place 3, and refusing to remove Justice Wallace from the ballot. *See Wallace v. Howell*, 707 S.W.2d 876 (Tex. 1986). Howell remained a candidate for Place 1.

On March 25, 1986, Howell brought suit in the United States District Court for the Southern District of Texas, Houston Division, in Cause No. H-86-1230, *Howell v. Supreme Court of Texas, et al.*, seeking to compel all nine justices to recuse themselves. The suit challenged the

constitutionality of Texas Rule of Appellate Procedure 15a, as does this suit. Judge Gabrielle McDonald denied Howell's request for temporary injunction after a hearing was held in April 1986. Howell appealed this denial to the Fifth Circuit, and the case was set for expedited hearing. The Fifth Circuit denied Howell's request for an injunction pending appeal, stating that "[w]hile the district court may have had jurisdiction, at least that part of the claim asserting that the statute . . . is unconstitutional, Judge Charles Ben Howell has not shown the likelihood of success on this claim or on the other constitutional issues indispensable to an injunction pending appeal."

At the hearing before the Texas Supreme Court, Howell's attorney argued that the challenge to Rule 15a and to the justices' refusal to recuse themselves was "of importance, not only to the case in hand but to the law in general, there being no Texas case and few cases nationally ruling upon the grounds for disqualification or recusal of an appellate court or its members on grounds of bias and prejudice or the appearance thereof." Nonetheless, when Howell's appeal to the Fifth Circuit was not decided before May 3, 1986, the date of the Republican primary election, Plaintiff took a non-suit because he believed the issue to be moot. He won the Republican primary, and became the Republican candidate for Place 1. Howell chose to use his available resources to campaign against Justice Mauzy, the Democratic candidate for Place 1, rather than to pursue the Fifth Circuit appeal.

In December 1987, Howell announced his intention to oppose Justice Raul Gonzalez in the upcoming election. On January 4, 1988, Howell filed for Justice Gonzalez' seat after considering whether to run for Chief Justice. At the time of the ruling on the application for writ of error in the *Homecraft* case, Justice Gonzalez was the Democratic candidate for Place 3, and Howell was the Republican candidate. The election was held on November 8, 1988.

Howell was openly critical of the justices' practices in accepting campaign contributions, and of the Texas Supreme Court's refusal of the application for writ of error in the *Texaco v. Pennzoil* litigation. In addition, Howell has applauded the Tejeda Committee's investigation into alleged misconduct by some of the justices.

Howell has sued Justice Oscar Mauzy and his wife for allegedly violating Texas campaign contribution and expense disclosure laws. This case was ongoing when the Texas Supreme Court considered Howell's application for writ of error in the *Homecraft* litigation.

Finally, Howell acknowledges that the bad faith verdict against him in the *Homecraft* litigation was capitalized upon by Justice Mauzy in the 1986 campaign. He acknowledges that the bad faith verdict will likely be an issue in the 1988 campaign, unless it is set aside by the Supreme

Court, and that once it receives the imprimatur of the Supreme Court, the bad faith verdict will be an "even more lethal campaign tool."

It is abundantly clear to the Court that Howell filed this case to harass the incumbent Texas Supreme Court justices in the three months immediately preceding the November 8, 1988 election in which he sought to become a Texas Supreme Court justice. Howell has a history of filing lawsuits against Texas Supreme Court justices, and then moving for the justices' recusal when a case in which he is a litigant reaches the Texas Supreme Court. He also has a history of filing actions in federal district court challenging the constitutionality of Texas Rule of Appellate Procedure 15a, when the justices refuse to recuse themselves. If Howell had a sincere interest in challenging the constitutionality of the recusal statute and in establishing law on the grounds for recusal or disqualification of an appellate judge on the grounds of bias and prejudice, then the Court believes that he would have pursued the previous litigation in the Fifth Circuit. Instead, Howell chose to voluntarily dismiss the appeal when it was not resolved before the Republican primary.

Furthermore, the Court views Howell's request for a temporary restraining order and for a preliminary injunction as a transparent effort to further delay U.S. Home's and Homecraft's collection of the state judgment, for both political and personal reasons. Howell admitted that he knew that once the judgment against him for bringing a DTPA

action in bad faith received the imprimatur of the Texas Supreme Court, it would become an even more lethal campaign tool. The Court concludes that Rule 11 sanctions against Howell and his attorney are appropriate for having brought this action for purposes of harassment and delay.

The Court is of the further opinion that Rule 11 sanctions against Howell and his attorney are appropriate for the August 25, 1988 filing of Plaintiff's Preliminary Injunction Brief. This filing does not embody existing legal principles or a good faith argument for the extension, modification, or reversal of existing law, at least to the extent that it contends that plaintiffs will suffer irreparable harm in the absence of an injunction.

Rule 11 explicitly provides that a court may order a party who violates the rule to pay his opponent reasonable expenses and attorney's fees caused by the violation. *Thomas*, 836 F.2d at 878-79. In considering the reasonableness of expenses and attorney's fees, the Court should examine whether they could have been avoided or were self-imposed, and whether the party seeking the sanctions gave prompt notice to the Court and the opposing party of the intent to seek Rule 11 sanctions. *Id.*

Defendants sought sanctions under Rule 11 promptly upon Howell's filing of this suit. Pursuant to the Court's request, each of the Defendant's attorneys have submitted affidavits reflecting the attorney's fees and expenses

incurred by their clients in this federal action. They have itemized the costs as follows:

Defendant	Attorney	Fees	Expenses
The Supreme Court of Texas, the Justices thereof, and the Attorney General of Texas	Gary Bledsoe	$1,575.00	-0-
Homecraft Land Development, Inc., and U.S. Home Corporation	Robert T. Mowrey	$5,300.00	$554.58
	Jennifer B. Altabef	$6,734.00	-0-
Stewart Title Company	Edmund R. Wood	$4,125.00	$394.09
	Frank Oliver	175.00	9.29
	Jeff A. Armstrong	625.00	-0-
Justice Oscar Mauzy	David R. Richards	$3,275.00	$422.10

The court is of the opinion that these attorney's fees and expenses are reasonable, could not have been avoided, and were not self-imposed. Accordingly, the Court will require Howell and his attorney, Ken E. Mackey, to pay Defendants these attorney's fees and expenses as a sanction pursuant to Federal Rule of Civil Procedure 11.

The Court is of the opinion that a lesser sanction would not have the desired effect. The Court finds especially disconcerting that this is the second time in the *Homecraft* litigation alone that a fact finder has found Howell to be acting improperly: first, when $75,000 in attorney's fees were assessed against him by the state court for bringing his DTPA cause of action in bad faith, and second, this Court's assessment of attorney's fees and expenses, for filing a case over which the Court clearly does not have jurisdiction, and that it is clearly brought to harass and delay.

IT IS HEREBY ORDERED that the Motion for Leave to File Defendants Homecraft Land Development Inc.'s and U.S. Home Corporation's Reply to Plaintiff's and Ken E. Mackey's Response to Motion for Sanctions and Plaintiff's Supplemental Brief in Support of Plaintiff's Response to Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that Defendant Justice Oscar Mauzy's Motion to File Original Deposition is GRANTED.

IT IS FURTHER ORDERED that the Motion to Dismiss of Defendants Supreme Court of Texas, the Members and Justice Thereof and the State of Texas is GRANTED; that Defendant Stewart Title Company's Motion to Dismiss is GRANTED; and that the above numbered and styled cause of action is DISMISSED for lack of jurisdiction.

IT IS FURTHER ORDERED that Defendants Homecraft Land Development, Inc.'s and U.S. Home Corporation's Motion for Sanctions is GRANTED; and that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Homecraft Land Development, Inc., and U.S. Home Corporation $12,034.00 in attorney's fees and $554.58 in expenses as sanctions pursuant to Federal Rule of Civil Procedure 11.

IT IS FURTHER ORDERED that Defendant Justice Oscar Mauzy's Motion for Rule 11 Sanctions is GRANTED; and that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Justice Oscar Mauzy $3,697.10 in attorney's fees and expenses as sanctions pursuant to Federal Rule of Civil Procedure 11.

IT IS FURTHER ORDERED that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Defendant Stewart Title Company $5,328.38 in attorney's fees and expenses as sanctions pursuant to Federal Rule of Civil Procedure 11.

IT IS FURTHER ORDERED that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Defendants the Supreme Court of Texas, the justices thereof, and the Attorney General of Texas $1,575.00 in attorney's fees as sanctions pursuant to Federal Rule of Civil Procedure 11.

[R.6-21]

THE SUPREME COURT OF TEXAS; Charles Ben Howell v. Homecraft Land Development, Inc., et al.; No. C-7113; April 27, 1988.

[Notation re: Decision of the
Texas Supreme Court]

[NOTE: The federal questions raised by the petition relate to the attempts by petitioner to disqualify members of the Texas Supreme Court from hearing an application for writ of error to that court. That court delivered no opinion or any other explanation, written or oral, concerning the matters that it ruled upon. The relevant orders of that court are reproduced *infra.*]

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT; Charles Ben Howell, et al. v. The Supreme Court of Texas, et al.; No. 89-1032, Summary Calendar; October 11, 1989.

JUDGMENT

Before REAVLEY, KING and JOHNSON, Circuit Judges.

This cause came on to be heard on the record on

appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant and appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT; Charles Ben Howell, et al. v. The Supreme Court of Texas, et al.; No. 89-1032, Summary Calendar; November 8, 1989.

ON PETITION FOR REHEARING

Before REAVLEY, KING and JOHNSON, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION; Charles Ben Howell v. The Supreme Court of Texas, et al.; Civil No. 88-CA-644; November 18, 1988.

JUDGMENT

[NOWLIN, District Judge:]

This action came on for consideration before the Court, and the issues having been duly considered;

IT IS ORDERED that the Motion to Dismiss of Defendants Supreme Court of Texas; the Members and Justices Thereof and the State of Texas is GRANTED; that Defendant Stewart Title Company's Motion to Dismiss is GRANTED; and that the above numbered and styled cause of action is DISMISSED for lack of jurisdiction.

IT IS FURTHER ORDERED that Defendants Homecraft Land Development, Inc.'s and U.S. Home Corporation's Motion for Sanctions is GRANTED; and that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Homecraft Land Development, Inc., and U.S. Home Corporation $12,034.00 in attorney's fees and $554.58 in expenses as sanctions pursuant to Federal Rule of Civil Procedure 11.

IT IS FURTHER ORDERED that Defendant Justice Oscar Mauzy's Motion for Rule 11 Sanctions is GRANTED; and that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Justice Oscar Mauzy $3,697.10 in attorney's fees and expenses as sanctions pursuant to Federal Rule of Civil Procedure 11.

IT IS FURTHER ORDERED that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Defendant Stewart Title Company $5,328.38 in attorney's fees and expenses as sanctions pursuant to Federal Rule of Civil Procedure 11.

IT IS FURTHER ORDERED that Plaintiff, Charles Ben Howell, and his attorney, Ken E. Mackey, shall pay Defendants the Supreme Court of Texas, the justices thereof, and the Attorney General of Texas $1,575.00 in attorney's fees as sanctions pursuant to Federal Rule of Civil Procedure 11.

[R.3-4]

[Orders of the Texas Supreme Court]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC. ET AL., RESPONDENTS, NO. C-7113.

February 1, 1988. Petitioner's motion for recusal or disqualification, filed herein on January 22, 1988, together with petitioner's motion for additional time to prepare arguments in support of Application for Writ of Error filed herein on January 25, 1988, in the above styled and numbered case having been duly considered, it is ordered that said motion for recusal, after recusal statements certifying the recusal to the Supreme Court were filed on February 1, 1988 by Chief Justice Phillips and Justices Spears, Ray, Wallace, Robertson, Kilgarlin, Gonzalez and Mauzy, be, and hereby is, overruled (as to all Justices except Justice Culver), and that the motion for additional time to prepare argument in support of application be, and hereby is, granted with the following notation: *See Rule 131 (i), Texas Rules of Appellate Procedure.*

[R.745]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL V. HOMECRAFT LAND DEVELOPMENT, INC. ET AL., NO. C-7113; April 20, 1988.

April 20, 1988. Petitioner's second motion for recusal or disqualification of The Honorable Thomas R. Phillips filed herein on April 13, 1988 having been duly considered, it is ordered that said second motion be, and hereby is, overruled.

[R.744]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL V. HOMECRAFT LAND DEVELOPMENT, INC. ET AL., NO. C-7113; April 27, 1988.

April 27, 1988. Application of petitioner for writ of error to the Court of Appeals for the Fifth District, together with respondents', Homecraft Land Development, Inc. and U. S. Home Corporation, motion to dismiss appeal or, in the alternative, for sanctions, and petitioner's motion to strike respondents' "amended brief," and petitioner's motion for leave to file reprinted copy of petitioner's reply brief, and petitioner's motions for clarification of order overruling petitioner's motions for the recusal or disqualification of The Honorable Franklin S. Spears, The Honorable C. L. Ray, The Honorable James P. Wallace, The Honorable Ted Z. Robertson, The Honorable William W. Kilgarlin, The Honorable Raul A. Gonzalez, The Honorable Oscar Mauzy, and The Honorable Barbara Culver with alternative motions

for disclosure and for reconsideration, having been duly considered, it is ordered that respondents' motion to dismiss appeal or, in the alternative, for sanctions be overruled and further that petitioner's motion to strike respondents' "amended brief," and petitioner's motion for leave to file reprinted copy of petitioner's reply brief, and petitioner's motions for clarification be, and hereby are, overruled, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is ordered that the Court of Appeals for the Fifth District release its unpublished opinion of October 13, 1987, in its case No. 05-86-01164-CV entitled CHARLES BEN HOWELL v. HOMECRAFT LAND DEVELOPMENT, INC. ET AL. for publication.

It is further ordered that applicant, Charles Ben Howell, and sureties, Tom S. McCorkle and Shelley Garrett, pay all costs incurred on this application.

[R.743]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL V. HOMECRAFT LAND DEVELOPMENT, INC. ET AL., NO. C-7113; June 1, 1988.

June 1, 1988. Petitioner's motion for rehearing of application for writ of error, together with petitioner's motions for clarification of orders of February 1, 1988 and April 20, 1988 overruling petitioner's original and second motions for the recusal or disqualification of The Honorable Thomas R. Phillips with alternative motions for disclosure and for reconsideration, having been duly considered, it is ordered that the motions for clarification of orders be overruled, and that said motion for rehearing be, and hereby is, overruled.

[R.742]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113.

[Statements by the Justices Of the Texas Supreme Court]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Thomas R. Phillips
Chief Justice

[R.765]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Franklin S. Spears
Justice

[R.766]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/C. L. Ray
Justice

[R.767]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/James P. Wallace
Justice

[R.768]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Ted Z. Robertson
Justice

[R.769]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/William W. Kilgarlin
Justice

[R.770]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Raul A. Gonzalez
Justice

[R.771]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Oscar H. Mauzy
Justice

[R.772]

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Barbara G. Culver
Justice

[R.773]

[Extracts from Pleadings of Petitioner]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113

[Petitioner's] Motion for Recusal
Or Disqualification
[filed 22 JA 88]

Comes now, Charles Ben Howell, Petitioner and moves for the disqualification or recusal from this case of the Honorable Thomas R. Phillips, the Honorable Franklin S. Spears, the Honorable C. L. Ray, the Honorable James P. Wallace, the Honorable Ted Z. Robertson, the Honorable William W. Kilgarlin, the Honorable Raul A. Gonzalez, the Honorable Oscar Mauzy and the Honorable Barbara Culver. This motion is addressed to the said Honorable Justices, both individually and collectively. In support of his motion, petitioner would show the following:

This motion is based upon the affidavit of Charles Ben Howell, annexed hereto and incorporated herein by reference. Such affidavit states with particularity the grounds why each of the aforesaid justices of this court should not sit in this case. Specifically, with respect to each and everyone of the aforenamed individual justices of the Supreme Court, the affidavit states facts from which it may fairly and reasonably be inferred that each of the aforenamed justices harbors a

personal bias or prejudice toward this petitioner. Alternatively, the facts set forth in the annexed affidavit present the fair and reasonable inference that the impartiality of each of the above-named justices might reasonably be subject to question. Based thereon, petitioner alleges that each of the aforenamed justices is disqualified to preside herein or, alternatively, each of the aforenamed justices is subject to recusal herein.

This motion is grounded upon and is made pursuant to the provisions of Rule 15a(2) of the Texas Rules of Appellate Procedure providing:

> Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or a personal knowledge of disputed evidentiary facts concerning the proceeding.

This motion is alternatively made pursuant to and is grounded upon the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and upon the provisions of the Constitution of the State of Texas guaranteeing Due Process of Law and Due Course of Law. In particular, petitioner relies upon those constitutional principles declaring that trial before a fair and impartial tribunal, a tribunal whose

members are not only fair and impartial in fact, but fair and impartial in appearance, is a cornerstone of Due Process.

Petitioner further moves that the court apply to this case the mandatory disqualification standards to which R.15a(1) of the Texas Rules of Appellate Procedure. That is to say, petitioner moves that this court hold it to be mandatory that a judge or justice withdraw from the case wherever it may fairly and reasonably be inferred that such judge or justice harbors a personal bias or prejudice toward a party and wherever the fair and reasonable inference is presented that the impartiality of such judge or justice might reasonably be subject to question.

In this connection, petitioner would show that R.15a(1) sets forth the standards for the withdrawal from a case of a judge or justice pursuant to the disqualification or recusal provisions of the Texas Constitution, Art. V, sec. 11, whereas R.15a(2) undertakes to set forth the standards for recusal or disqualification of judges pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Insofar as the said rule purports to establish less onerous requirements for an offended party to secure recusal or disqualification grounded upon the State Constitution than the requirements imposed in order to secure recusal or disqualification grounded upon the Constitution of the United States, said Rule 15a is unconstitutional as repugnant to the Due Process and Equal Protection Clauses of the United States Constitution. If such be necessary, petitioner challenges

the said R.15a on the grounds of invidious discrimination.

Petitioner moves and directs the Clerk of the Supreme Court to present this motion to each of the above named justices ten days after the filing hereof so that each such justice may decide either to voluntary disqualify or recuse or to certify the matter to the entire court.

Should any of the justices named herein decline to withdraw from the case, petitioner moves and requests that each said Honorable Justice so declining prepare and file with the court, prior to en banc hearing hereon, a statement in writing responding to and answering the fact allegations contained in this motion and in petitioner's affidavit. This request may be satisfied through a short statement to the effect that the facts stated by petitioner with respect to the statement-maker is substantially correct. Any error or omission by petitioner should, of course, be pointed out.

Petitioner waives any requirement that statements by the individual justices be verified. If the said Honorable Justices or any of them should either decline to prepare a statement or if the statement should be manifestly insufficient, then the court when it convenes itself en banc should consider the allegations and conclusions of this petitioner herein contained to be fully established and petitioner so moves.

Copies of this motion are being served on all other parties or their counsel of record as shown by the certificate

hereto and said parties and their counsel are hereby provided with notice that movant expects this motion to be presented to each of the justices mentioned herein ten days after the filing of this motion unless otherwise ordered by any justice aforenamed or by the court. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

Wherefore, PREMISES CONSIDERED, petitioner asks relief as follows:

(1) That the above-named Chief Justice and Justices Spears, Ray, Wallace, Robertson, Kilgarlin, Gonzalez, Mauzy and Culver and each of them proceed to voluntarily disqualify, recuse or withdraw herefrom or that they respectively certify their individual unwillingness to do so to the court en banc;

(2) That should they or any of them decline to recuse, then that each said justice so declining proceed to file with the court a written statement responding to the factual allegations of this verified motion;

(3) That this motion be heard en banc deciding the recusal of each justice, one at a time, so that the particular justice being considered each time shall not sit en banc to consider the motion as it directly affects him;

(4) That each of the aforesaid Honorable Justices be recused or disqualified from further service herein;

(5) That the fact of disqualification or recusal be certified to the Governor of the State, together with a request that he immediately commission the requisite number of persons, learned in the law and not possessed of the impediments or disqualifications outlined herein, for the trial and determination of this cause.

[R.694-9]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113.

[PETITIONER'S] AFFIDAVIT IN SUPPORT OF MOTION FOR RECUSAL OR DISQUALIFICATION

[Filed 22 JA 88]

I am 62 years of age. I have been for the major part of my adult life involved in Republican politics. I have continuously been involved in Republican party affairs and have worked for, contributed to and publicly supported the candidates of the Republican party. Including the 1988 election campaign which is just now getting under way, I have been a candidate for office for the last eleven successive elections. Every two years commencing in 1968, I have filed in the Republican primary as a candidate for judicial office. My campaigns were always contested and in most instances, I ran against a Democratic incumbent. My first six campaigns were

unsuccessful. In 1980, I was first elected as a district judge in Dallas County, ousting a Democratic incumbent. In 1982, I was re-elected, defeating a Democratic challenger. In 1984, I was elected as Justice of the Court of Appeals for the 5th District defeating a well-entrenched Democratic incumbent.

In my campaign, I have avoided all types of false charges. I have never-the-less been a hard hitter and have leveled numerous charges against my Democratic opponents. I have come to be known as a controversial candidate; some have called me a maverick. My campaigns, particularly in recent years have become lightning rod campaigns where the entire Democratic slate and the Democratic party organization in general have targeted me as the judicial candidate that they were most anxious to beat. Regardless of such facts, I have been elected and re-elected. Because of the foregoing, I have accumulated a large number of critics and detractors, within the Democratic party and within the liberal press.

On January 23, 1986, I formally announced, filed the official application for place on ballot and paid the filing fee as a candidate in the Republican Primary for the office of Justice of the Supreme Court, Place 1. My probable Democratic opponent at that time was the Honorable Oscar Mauzy. Prior to the filing deadline of February 3, 1986, Judge Nathan Hecht filed for the same office in the Republican Primary and I thereby became involved in a contested primary. Primarily because of a shortage of funds and resources, I desired to avoid the necessity of a primary

election contest. I consulted with the State Republican Chairman, the Honorable George W. Strake, Jr. about the problem on February 3, 1986, immediately prior to the deadline to file for office. With his consent, I withdrew as a candidate for Justice of the Supreme Court, Place 1 and filed for office as Justice of the Supreme Court, Place 3. In such position, my probable Democratic opponent was the Honorable James P. Wallace, a respondent to my motion for recusal. He had no other opponent, Republican or Democrat.

On February 20, 1986, Judge Wallace filed a suit against me as an original mandamus action in the Supreme Court of Texas, No. C-5034. I counter-claimed filing a suit to remove Judge Wallace from the ballot, No. C-5057, filed on February 27, 1986.

Believing then as I now believe, that I would be unable to obtain a fair and impartial hearing before the Texas Supreme Court, I filed on February 27, 1986 a motion for recusal in both of the foresaid pending causes Nos. C-5034 and C-5057 challenging the following named justices, the Honorable John L. Hill, Jr., Chief Justice, the Honorable Sears McGee, the Honorable Robert M. Campbell, the Honorable Franklin S. Spears, the Honorable C. L. Ray, the Honorable James P. Wallace, the Honorable Ted Z. Robertson, the Honorable William W. Kilgarlin and the Honorable Raul A. Gonzalez. The said motion was overruled by the court on March 3, 1986. The court failed to hold a hearing of any kind and failed to render an opinion of any

kind. Even though requested to do so, none of the challenged judges issued any kind of statement responding to plaintiff's specific reasons, given under oath, for the recusal or disqualification of each said justice.

The combined causes, Nos. C-5034 and C-5057 were argued before the court on two days' notice, said hearing occurring on March 5, 1986. My counsel, Mr. Howard D. Pattison, commenced his argument by discussing plaintiff's motion for recusal and disqualification. Members of the court, particularly Justice Kilgarlin and Justice Spears began lecturing my attorney to the effect that such motion had already been overruled and that counsel should proceed to the merits. My counsel argued that the matter was of importance, not only to the case in hand but to the law in general, there being no Texas case and few cases nationally ruling upon the grounds for disqualification or recusal of an appellate court or its members on grounds of bias and prejudice or the appearance thereof. My counsel insisted that such aspect of the case should be fully heard and that the court should deliver an opinion thereon. Within the first five minutes of the allotted forty-minute argument time (20 minutes for each case), my attorney was ordered from the bench to discontinue his presentation upon the motion for recusal or disqualification or he would be required to discontinue his argument altogether and take his seat.

I was present and heard everything that transpired. Several representatives of the news media were present.

Afterwards, a news dispatch from UPI stated that the Honorable Chief Justice Hill "bristled Wednesday when an attorney requested that the entire court recuse itself" on the proposition that "said Democrat-dominated court would give the appearance of bias if it heard the case involving Howell, a Republican." The Honorable Chief Justice was further quoted as declaring:

> We are a legal court, a law court. We do not make our decisions based on politics, . . . we make rulings based on the law. Politics plays no part in our decision making.

On March 12, 1986, the court issued an opinion removing me from the Place 3 ballot and refusing to remove my Democratic opponent, Justice Wallace from the ballot. See *Wallace v. Howell*, 707 S.W.2d 876 (Tex.1986). The opinion was released at 9:00 a.m. Anticipating the court's ruling, I had previously notified the capital press corps that I would hold a press conference on the front steps of the Supreme Court Building at 9:00 a.m. on that date. The news conference was attended by reporters from newspapers, radio and television. In good faith, I criticized the Supreme Court and the above-named members for the issuance of a blatantly political decision. In my remarks and in my prepared news release, I criticized the court and each of its members named above for refusing to hear argument upon the recusal motion and refusing to address the disqualification issue in its opinion. I stated that the issue would not go away simply

because the court chose to pretend that the issue was not there.

At the same time, a committee of the state legislature, known as the Tejeda Committee was conducting investigations into allegations of possible misconduct on the part of members of the Supreme Court and its proceedings were widely reported by the news media. Shortly after March 12, the Honorable Chief Justice testified before the committee. According to published reports, he accused me or inferred that I had infiltrated the court through unnamed members of its staff and that I had thereby obtained a leak or advance information regarding the court's decision in the Judge Wallace litigation. Apparently, he based his charges upon the fact that I had scheduled a news conference in advance before knowing of the court's decision and that I had distributed at that conference and immediately thereafter, about 30 copies of a previously-prepared news release criticizing the court's decision. On information and belief, a copy of that news release was exhibited to the Chief Justice by some recipient thereof, probably for the purpose of obtaining his comments. In all likelihood, copies of the news release were circulated to all members of the court and discussions were had among the justices concerning my news release and my news conference, which discussions included comment on the fact that my news conference was obviously pre-arranged, and prepared in advance and purposely scheduled to occur simultaneously with the issuance of the court's decision.

Upon being advised of the Chief Justice's testimony before the Tejeda Committee, I immediately contacted the news media and denied the charges. I stated that it was ridiculous to assume that this Republican judge residing in a city 200 miles distant from the court had any secret means to invade the deliberations of an all Democrat court. I stated that my news conference and news release were pre-arranged because the political bias and the arrogant attitude of these justices was completely transparent, the result of the case being obvious from the outset to any intelligent observer of the law and the political scene.

On March 25, 1986, I brought suit seeking relief from the action of the Texas Supreme Court in the United States District Court for the Southern District of Texas at Houston, *Howell v. The Supreme Court of Texas, et al,* Cause No. H-86-1230. All nine members of the Supreme Court were named as parties to the action and were served with summons, my complaint alleging:

> Inasmuch as plaintiff attacks the interpretation [of the Texas Election Code] promulgated by the Supreme Court of Texas, the Supreme Court and its justices are made parties hereto . . . in accordance with the *Heffner v. Alexander,* 779 F.2d 277 (Fifth Circuit 1985).

Copies of my complaint were officially served upon each

member of the Supreme Court and were read by each of them. In the complaint, I made several allegations that the defendant members of the court would in all likelihood consider as derogatory and disparaging. The case was actively followed by the news media and I was interviewed regarding the case on several occasions. I was quoted as continuing to criticize the Supreme Court for entering a decision which I considered to be politically motivated. A temporary injunction hearing was held in the federal court during April, 1986. All nine justices of the Supreme Court appeared by counsel. The Honorable James P. Wallace was placed under subpoena by my attorney and he was forced to appear and testify through adversary examination. Through such examination, my attorney established that Justice Wallace had elected to file a case before a Supreme Court composed of his political allies, his friends and his colleagues, with whom he had a continuous daily working relationship, instead of filing the case with a lower court which had ample jurisdiction to consider his claims.

The federal district court denied relief on jurisdictional grounds unrelated to the merits and my attorneys took an appeal to the United States Court of Appeals for the 5th Circuit. Through my attorneys, I moved for immediate hearing in that court and the court, finding my case to be meritorious in nature, ordered the same to be heard about six weeks hence. In the meantime, I won the primary election contest for Place 1 against Judge Nathan Hecht, an election contest that I had sought to avoid and which I could not

afford to run. I then concluded that it was my best recourse not to further deplete my resources with litigation and to campaign for election to Place 1 on the Supreme Court as ordered by the decision of March 12. I therefore withdrew my Federal appeal and it was dismissed.

Because of the action of the Supreme Court, I was forced to deplete my resources in litigation and in conducting an unwanted Republican primary election contest with Judge Nathan Hecht. I was also forced to run against then State Senator Oscar Mauzy, the Democratic nominee for Place 1 rather than against Justice Wallace. Senator Mauzy, through long service in the legisiature, was far better known to the voting public than Justice Wallace and had considerably more political campaign experience. He had far more funds to spend than Justice Wallace. Even so, I managed to obtain almost 45% of the vote against Senator Mauzy. By reason of his lawsuit, Justice Wallace was re-elected by default with no opposition either at the primary or the general election. If the money and resources that I had been forced to squander in the Republican primary and in the Judge Wallace litigation [had] been available to me during the general election and had I been able to campaign against the lesser known Democratic candidate with less funding and less campaign experience, I believe that I could have won election to the Texas Supreme Court in 1986. By and through their rulings in Justice Wallace's case, the respondent Democratic members of the Texas Supreme Court managed to maintain 100% Democratic control over that court.

The election campaign lasted until November, 1986. I traveled throughout the state. I talked to many groups and organizations. I was interviewed by numerous reporters for newspapers, radio and television broadcasters. I continually criticized the fact that Texas had an all-Democrat Supreme Court. I pointed to the *Wallace* case and the refusal of the justices or any of them to disqualify as evidence that the court was politically biased and politically motivated. I charged that such arrogance was the direct result of a century of virtually absolute dominance of the court by a single political party; to-wit, the Democratic Party. My remarks were such that each incumbent Democrat on the court was likely to be personally offended thereby. I have reason to believe that each member of the court followed my campaign and was well aware of my campaign statements and campaign tactics.

During the course of my campaign, the hearings of the Tejeda Committee continued. According to published reports, the activities of that committee concentrated upon the activities of the Honorable C. L. Ray and the Honorable William Kilgarlin. I have numerously commented on the Tejeda hearings and the conduct of Justices Ray and Kilgarlin as outlined in published reports of testimony before that committee. I incorporated newspaper clippings concerning the activities of the Tejeda Committees into my campaign literature and distributed a large number of copies thereof. In my appearances before the public and before the media, I numerously and repeatedly discussed the Tejeda Committee hear-

ings, particularly with regard to Justices Ray and Kilgarlin. I deplored the fact that these two justices had filed a defamation suit against a former briefing attorney of the court declaring that such lawsuit was a flagrant and obvious attempt to coerce that briefing attorney and other persons similarly situated into silence. I further deplored the fact that Justices Kilgarlin and Ray solicited funds to cover the expense of their lawsuit from attorneys practicing before the court.

When the Chief Justice proposed that the matter be turned over to the Judicial Conduct Commission, I applauded the suggestion. The Judicial Conduct Commission finally issued reports dated June 8, 1987 which substantiated many of my contentions.

The name of Justice Spears was also brought into the Tejeda Hearings. According to published reports, a former briefing attorney testified that Justice Kilgarlin brought an attorney into Justice Spears office on a particular date, borrowed Justice Spears' personal work file and allowed the attorney to examine it. Testimony was also given that on another occasion, a briefing attorney complained to Justice Spears about ex parte conversations that Justice Ray had engaged in with a particular attorney. Justice Spears reportedly advised the briefing attorney that the complaint was well founded. I incorporated clippings of this testimony into my campaign literature and spoke numerously concerning this matter criticizing Justice Spears for his failure to take affirmative action concerning the matter.

Early in the year 1987, the case of Texaco, Inc. v. Pennzoil Company, 729 S.W.2d 768 (Tex.App.—Houston [1st Dist.] 1987) was decided by the Court of Appeals at Houston. During the summer of 1987, the case was brought to the Texas Supreme Court on application for writ of error. The case involved one of the largest judgments in history, around $10 billion. The case received extensive publicity. In particular, considerable publicity was given to the large campaign donations of attorneys involved in the case. Attorney Joe Jamail, counsel for Texaco was identified as one of the most lavish givers of political campaign contributions to judges. The Dallas Times Herald published an article analyzing political contributions received by the nine justices of the Texas Supreme Court and published a tabulation showing that a small clique of attorneys had given to the membership of the Supreme Court well over a million dollars in campaign contributions. Mr. Jamail and other attorneys identified with the Texaco case were prominent on the Times Herald tabulation.

Shortly before the end of the year, the Supreme Court, without conducting any kind of hearing and without issuing any kind of opinion refused to grant a writ of error in the Texaco case, undoubtedly the largest case ever to come before that court. A great deal of adverse publicity ensued, particularly in the Wall Street Journal and in Eastern newspapers. It was widely intimated that the court's decision not to hear Texaco was attributable to the massive political

contributions which had been received from both sides of the case.

On December 6, 1987, the CBS television network program "Sixty Minutes" presented a feature on the Supreme Court and its members entitled "Justice for Sale?" That television program concentrated upon the large contributions received by members of the court, upon Mr. Jamail who had been dubbed "the man who bankrupted Texaco," and heavily implied that the justices of this court might well have been influenced in their conduct in the Texaco case and other cases by the fact that they had received massive contributions from a small group of lawyers.

I received almost 45% of the vote at the November, 1986 election. During the next 14 months I remarked to various friends and supporters that the fact that I had come close in my 1986 race had left me with the desire, if I was able, to make another race in 1988. I was identified several times in the news media as a probable Republican candidate for the Supreme Court at the 1988 elections.

Finally, on December 8, 1987, I came to Austin, held a press conference and issued a news release, copies of which were shortly thereafter distributed to approximately 100 news media throughout the state. I announced that I would be a candidate in the Republican primary for Place 3 on the court then held by Raul Gonzalez. I was quoted in the news release and in the media as stating that the time for judicial reform

had come. I declared "the Texas Supreme Court has become a national disgrace, by reason of Texaco v. Pennzoil and by courtesy of CBS and 'Sixty Minutes.' " I declared that the case had put the judges on the spot and that, either way they ruled, they were bound to make some of their big money backers mad. I accused the court of pulling a "cop-out" by refusing to hold a formal hearing in a case involving billions of dollars, thousands of Texas jobs, hundreds of thousands of shareholders plus Texaco customers, dealers and suppliers around Texas and around the nation. I stated that Texas has suffered too long from a one-party judicial system controlled by a handful of lawyers and predicted that victory would be ours in 1988 because the people are demanding an end to a one-partisan judiciary and the good old boy system.

Since that date, I have made several public appearances and have been interviewed by a number of reporters from newspapers, radio and television. I have repeated the foregoing remarks and have made similar remarks. I have distributed numerous transcripts of the "Sixty Minutes" television program, usually highlighting the portion where the man who bankrupted Texaco bragged to a national television audience that "I've given to all of the Supreme Court justices, Gonzalez, everybody." My remarks have received widespread media attention.

Although I made a public announcement of my candidacy for the so-called Gonzalez seat on December 8, 1987, I did not immediately proceed to officially file as a candidate or

pay the filing fee. Within a few days, rumors were being relayed to me by Republican friends that certain of my critics within the Republican party considered that my candidacy was too controversial and that the Honorable Barbara Culver, then a district judge at Midland, was being pressed to file against me in the Republican primary.

In order to check out these rumors, I contacted Judge Culver by telephone on at least two instances. In the first instance, I repeated the rumors that I had heard and asked her if she was planning to run against me in the Republican party [primary] for the Gonzalez seat. She confirmed that she had been approached and urged to make the race. In return, I urged to her that if she wished to be a candidate for the Supreme Court in 1988, that she should engage in a primary contest with Judge Nathan Hecht, whom I had decisively defeated in the 1986 Republican primary as opposed to running against me, the victor in that primary. Judge Hecht was then an announced candidate in the Republican primary for Place 2, the Kilgarlin seat. Judge Culver indicated to me in return that the persons pressing her to make the race would not support her in a race against Judge Hecht. She stated that she had not reached a decision on filing for the Gonzalez seat but that she would make her decision very shortly. I requested that she extend me the courtesy of advising me of her decision as soon as it was reached and she stated that she would do so. Receiving no further communication from Judge Culver, I continued to contact her. She continued to respond indecisively stating in our final conversation just a few days

before the January 4, 1988 filing deadline that she was probably "out of it" unless there was "some major new development." Not convinced that Judge Culver was being entirely forthright, I continued to inquire and cause inquiry through various Republican party sources as to Judge Culver's probable intentions. I was informed that the persons who were pressing Judge Culver to run were primarily Republican friends of Justice Gonzalez, that such friends had, in fact, urged Justice Gonzalez on more than one occasion to switch to the Republican party but that he had refused to do so. According to my information, the persons pressing Judge Culver to run against me in the Republican primary really preferred that Judge Gonzalez not be opposed by the Republican party at all. I was told that Justice Culver was merely a so-called "hatchet man" candidate who would not file in the Republican primary at all unless I filed.

As the filing deadline drew near, my sources informed me that Justice D. Camille Dunn of the First Court of Appeals at Houston was contemplating entering the Republican primary for the Kilgarlin seat making her a Republican primary contestant with Judge Nathan Hecht. I was informed that as soon as Justice Dunn made her intentions known, that the same persons as were pressing Judge Culver to run against me for the Gonzalez seat had approached Justice Dunn and urged her to switch her announced plans and to run against me for the Gonzalez seat, Justice Dunn being assured that if she targeted the Gonzalez seat instead of the Kilgarlin seat, that Judge Culver would drop out of contention.

During the fall of 1987, Chief Justice Hill had announced his intention to resign from the Supreme Court effective January 4, 1988 and the Governor had announced that he would appoint the Honorable Thomas R. Phillips, a Republican, to succeed Chief Justice Hill. Under Texas law, the vacancy was required to be placed on the ballot at the next general election, meaning the 1988 general election ballot. This meant that four seats on the Supreme Court would be on the 1988 election ballot. Under the law, the deadline to file for all four seats was Monday, January 4, 1988 at 6:00 p.m.

I arrived at State Republican Headquarters a little after 4:00 in the afternoon. I announced that I had come to file for office for a seat on the Supreme Court. I repeated the various rumors that I had heard and stated that such rumors had caused me to rethink my declared intention to run for Place 3, the Gonzalez seat. I stated that I had come to the conclusion that Judge Culver or some other person unknown to me had been recruited as a "hatchet" candidate and that such candidate was hiding in the woodwork (possibly in the hotel across the street) ready to pounce upon me as soon as I filed for the Gonzalez seat. I had already checked and been informed that as of the time of my arrival at Republican headquarters, there was no officially filed Republican candidate for the Gonzalez seat. I declared that I had concluded that if I must be involved in a contested primary, that I had decided that I had would engage in a primary contest for the chief justice's seat with the Honorable Thomas

R. Phillips as my primary opponent. I stated that I considered the Honorable Justice Phillips to be vulnerable because he was an advocate of appointive judges rather than elected judges, the selection of judges by appointment being, in my opinion, not popular with the voting public in Texas. I further declared that I considered Chief Justice Phillips to be vulnerable on the issues of maturity and experience.

Chief Justice Phillips had taken the oath of office as an appointee earlier in the day and had also officially filed in the Republican primary to succeed himself. He was immediately informed of my announced decision to enter the Republican primary as a candidate for chief justice. Chief Justice Phillips was immediately informed of my announced decision to run for chief justice, the person calling him probably being Mr. John Weaver. Chief Justice Phillips dispatched a campaign lieutenant, a Mr. Carl Jordan to Republican headquarters to act on his behalf. Various discussions ensued between me, my aides, Mr. Jordan and party officials. A concerted attempt was made to convince me not to run for chief justice. I remained adamant. Finally within mere minutes of the 6:00 P.M. o'clock deadline, I received assurances from all persons present that Judge Culver would not be a candidate for any place on the Supreme Court, that Justice Dunn would be a candidate for the Kilgarlin seat and that there was no other Republican candidate, either actual or potential for the Gonzalez seat. As soon as I decided that the assurances to me were accurate, I delivered to the state chairman my official application for place on the ballot plus the proper filing fee. My filing was

completed not later than ten minutes prior to the filing deadline of 6:00 o'clock p.m. on January 4, 1988. I thereby became a candidate and am now a candidate, unopposed in the Republican primary, for Place 3, the Gonzalez seat on the Texas Supreme Court.

Two days after the normal filing deadline, the Honorable Justice Campbell, without prior indication of any kind, abruptly resigned his seat on the Supreme Court. The Governor announced the appointment of the Honorable Barbara Culver to succeed Justice Campbell and she immediately filed in the Republican primary as a candidate to succeed herself in the seat formerly held by Justice Campbell, designated on the ballot as Place 4. Including the Campbell seat and the Chief Justice's seat, there are now five positions in the Texas Supreme Court to be determined at the 1988 general election. The Republican party will have a candidate for each of the five positions, one of those candidates being this affiant. If all five Republican candidates are successful, the court will be converted, in a single year, from an all Democrat court to a court with a Republican majority.

Because of the aforesaid rivalries and controversies between this affiant and the Honorable Thomas R. Phillips and the Honorable Barbara Culver, and because those differences, controversies and political conflicts are of extreme recent vintage, affiant submits that it would be improper for them to sit in judgment upon the within application for writ of error filed by this affiant. To the extent

required by law, affiant states under oath that the said Honorable Thomas R. Phillips and/or the said Honorable Barbara Culver should each or both recuse themselves in this proceedings in that their impartiality might reasonably be questioned in that they have a personal bias or prejudice concerning this affiant, Charles Ben Howell, a party hereto or the subject matter of the within lawsuit.

Other than Chief Justice Phillips and Justice Culver, each of the justices of the Supreme Court, named above and of whom recusal is hereby sought is, each of them, a political ally of the Honorable Raul Gonzalez in that each of them has been, for the major part of his adult lifetime, actively involved in Democratic politics. They have each continuously been active in Democratic Party affairs and have worked for and have contributed and have publicly supported the candidates of the Democratic Party. They have numerously been candidates for office at the Democratic primary. They have served as Democratic officeholders in various capacities and they presently serve as Democratic officeholders and were, each of them, elected to the Supreme Court as a Democrat or were, each of them, appointed to the Supreme Court by a Democratic governor or were both elected and appointed as a Democrat. Those of them who achieved office by appointment actively sought to secure appointment from a Democratic governor. All such appointments were in part given to the recipients in recognition of previous activities in behalf of the Democratic Party and its candidates and upon the endorsement and support of persons active in Democratic

politics. The aforesaid seven justices had further sought office on numerous occasions by filing for the nomination of the Democratic Party in its primary and in campaigning for and securing such nomination and in representing the Democratic Party thereafter as one of its candidates at the general election. Not only is politics intrinsic in this lawsuit, but a close working relationship is also believed to exist between Justice Gonzalez and most, if not all of the other eight justices addressed herein. Each member of this court has a close working relationship with each other justice, meeting and visiting with his colleagues almost daily. Such relationship and the inevitable social contacts inherent therein create an atmosphere which is not conducive to detachment or to fair and impartial decision making, insofar as petitioner and the within case is concerned.

This affiant and the Honorable Justice Mauzy are currently engaged in litigation in that petitioner has pending suits against Justice Mauzy and his wife charging defendants with violation of the provisions of the campaign contribution and expense disclosure laws contained within the Texas Election Code. Charles Ben Howell, et al v. Oscar Mauzy, et al, Cause No. 86-13,909-G, 134th District Court, Dallas County, Texas; Charles Ben Howell, et al v. Oscar Mauzy, et al, Cause No. 406,958, 353rd District Court, Travis County, Texas.

Because of the facts about to be related, the within cause of action is a political lawsuit. At least, it has direct political

implications. First of all, this case went to trial during June of 1986 before a Democratic judge appointed by a Democratic governor. In this appeal, petitioner says that said Democratic officeholder condoned jury tampering by the opponents and refused to allow petitioner to investigate jury misconduct. Petitioner further says that said Democratic officeholder allowed the opposition to introduce much improper and derogatory evidence and that he further excluded much of petitioner's evidence and refused to properly instruct the jury regarding the legal rights of the parties. The jury proceeded to find that petitioner acted in bad faith and assessed $75,000.00 in attorney's fees against petitioner for acting in bad faith. Petitioner says that such bad faith finding is the direct result of the improper rulings of the Democratic judge who presided at the trial.

In the 1986 election campaign between petitioner and Justice Mauzy, Justice Mauzy capitalized upon the said bad faith verdict and publicized it widely in order to cause political embarrassment of petitioner and to cause petitioner to lose the confidence of the voting public. Each Democratic member of this court is well aware of the Honorable Justice Mauzy's campaign tactics relating to the within case and is aware of the fact that the bad faith verdict played a substantial part in plaintiff's 1986 election defeat.

Each Democratic member of this court is further well aware that the bad faith verdict in this case will likewise be an issue in the 1988 election campaign, unless the same be set

aside by the Supreme Court. In fact, each and every Democratic member of this court knows and appreciates that once the bad faith verdict obtains the imprimatur of the Supreme Court, if such be done, that such bad faith verdict will be an even more lethal campaign tool against this petitioner. This will be so even if the court elects to treat this case the same as it treated the case of Texaco v. Pennzoil and refuses to hold any type of hearing on the case and refuses to issue an opinion.

Political implications have been present in this case throughout. This case was first filed with the District Clerk of Dallas County during April, 1983. In accordance with local rules, the District Clerk has a computer which assigns cases to various courts by random selection. Through such random selection process, this case was assigned to the court of the Honorable Sid Fitzwater, a Republican. Judge Fitzwater promptly recused himself. The only known grounds for recusal were that petitioner and Justice Fitzwater were both Republican officeholders working in the same metropolitan courthouse complex where almost seventy judges are located. The nature of the acquaintance or social relations between petitioner and Judge Fitzwater were and are minimal. Our common working relationships were almost nil, being limited to attending monthly judicial conferences and occasional political gatherings where each time numerous people were present. Nevertheless, Republican Judge Fitzwater determined that it would best serve the image of fairness and justice if he would recuse and he did so.

Pursuant to law, the Honorable John Ovard of the First Administrative Judicial District appointed a visiting judge to handle the case. When that visiting judge later withdrew from the case for reasons personal to himself, Judge Ovard appointed another visiting judge. Both of the visiting judges appointed by Judge Ovard were Democrats. Judge Ovard is a Republican. Even though Judge Ovard appointed Democrats, petitioner had confidence that Judge Ovard would not have appointed Democrats who might be swayed by partisan considerations.

During the spring of 1986, Judge Fitzwater resigned from the State District bench to accept an appointment as Federal District Judge. The Democratic governor, then incumbent, appointed Judge Pryor, a Democrat to succeed Judge Fitzwater. Judge Pryor immediately declared himself a candidate on the Democratic ticket to succeed himself at the 1986 general election. Within almost days of coming on the bench, Judge Pryor took an approach diametrically opposite to the approach theretofore taken by Judge Fitzwater. Judge Pryor contacted the visiting judge who had been appointed by Judge Ovard and relieved him from further duty on the case stating that he, Judge Pryor knew of no reason why he, Judge Pryor, should not preside in the case. Judge Pryor proceeded to conduct a trial of the case while he, Judge Pryor, and this affiant were both of them candidates for election in the 1986 general election campaign, Judge Pryor as a Democrat and petitioner as a Republican.

After the bad faith judgment was entered against this petitioner, petitioner filed an appeal to the Court of Appeals for the Fifth District being the only court having jurisdiction in the premises. The Court of Appeals is composed of a Chief Justice and twelve justices, one of the justices being this petitioner. The court normally sits in three judge panels. Petitioner was, of course, disqualified under the provisions of the Texas Constitution to have any part in the case. However, neither the Chief Justice nor any of the other justices was in any wise disqualified under the Texas Constitution. At the time the appeal was perfected, the Chief Justice and all but two other justices of the Fifth District Court were Republicans. The membership of the Fifth District Court nevertheless considered that it would not serve the interest of justice for any three of the incumbent members of the Fifth District Court to preside over the appeal by petitioner. The membership of the court recused and withdrew itself from participation in the case.

Under the operating practices of the Supreme Court and the law, the Honorable Justice Ray of the Texas Supreme Court was then in charge of the transfer of causes between Courts of Appeals. The Chief Justice of the Fifth District Court of Appeals, with consent and approval of a majority, if not the entire membership of the Fifth District Court, other than affiant who took no part therein, requested that Justice Ray cause the transfer of this case to another Court of Appeals. Justice Ray did nothing for several months. Why he

failed to transfer the case is unknown. Several follow-up inquiries were made, but he still did nothing. Finally, Chief Justice Enoch of the Fifth District Court of Appeals contacted Chief Justice Hill of the Supreme Court and related the situation to Chief Justice Hill. Chief Justice Hill thereafter appointed a special panel of three visiting judges to sit on the Court of Appeals for the Fifth District to determine this case. Chief Justice Hill, a Democrat, appointed three Democratic justices to preside over the appeal of this case including the bad faith verdict against this affiant, a Republican officeholder. A decision was rendered affirming the case. In its opinion, the special panel failed and refused to address a large number of issues material to a determination of the case. In particular, the three judge panel again condoned of jury tampering and utterly failed to rule upon petitioner's points of error asserting that the trial court erroneously refused to allow petitioner to investigate jury misconduct and jury tampering even though at least five witnesses were validly subpoenaed and were present for examination.

In summary, the bad faith verdict was forged in a trial before a Democratic officeholder and was affirmed before a panel of three Democratic officeholders. Every Republican who has had contact with this case has determined that the best interests of justice would be served if they stood aside and recused themselves. Petitioner submits that the pattern has been set and that the membership of the Supreme Court should do likewise. Although the grounds for recusal are entirely different, they are much stronger than the

considerations which persuaded the Republican officeholders not to participate.

[R.710-40]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113.

[Petitioner's] Verified Exhibits in Support Of Motion for Recusal or Disqualification
[Filed 22 JA 88]

[News Article,] TYLER (TX) MORNING TELEGRAPH

THURSDAY, MARCH 6, 1986, sec. 1, p. 13

AUSTIN (UPI)—Chief Justice John Hill of the Texas Supreme Court bristled Wednesday when an attorney requested that the entire court recuse itself from hearing a case involving Justice Jim Wallace and his opponent, appeals court Judge Charles Ben Howell of Dallas.

Athens attorney Howard Patterson, who represents Howell, said the Democratic-dominated court would give the appearance of bias if it heard the case involving Howell, a Republican.

"We are a legal court, a law court. We do not make our

decisions based on politics," Hill said. "We makes rulings based on the law. Politics plays no part in our decision making."

Wallace, who did not participate in the hearing, filed a lawsuit alleging that Howell improperly filed for Wallace's Place 3 position on the court without properly withdrawing his application for Place 1.

[R.779, 88]

[NEWS RELEASE]

March 12, 1986
Immediate Release

For additional information:
Judge Charles Ben Howell
(214) 823 8400 (214) 749 6924

HOWELL ATTACKS UNFAIR RULING

Republican Judge Charles Ben Howell, now on the Texas Court of Appeals at Dallas, and seeking a seat on the Supreme Court, had harsh words for today's Supreme Court ruling that removed his name from the ballot as a candidate for Place Three. "It sure looks hard for a Republican candidate to get a favorable ruling from an all-Democratic court," Howell said. "First they threw Buster Brown off the ballot as a candidate for Attorney General and now they have done it to me."

"When Senator Brown got thrown off the ballot, he gave up. I can't blame him, but I assure you that I will not give up—not until the highest court in the land has agreed that I am ineligible."

"How was it possible for me to have a fair trial when everyone on the bench was a political activist for the opposing party? Furthermore, these judges are my opponent's fellow workers, his cronies, his day to day associates. The United states Supreme Court has held again and again that a fair and unbiased tribunal is a cornerstone of due process. I have been denied Due Process of Law."

Howell pointed out that the Texas Constitution provides for the governor to appoint a special court to hear the case where the Supreme Court is disqualified (Article 5, Section 11) and argued that the Supreme Court should have followed such procedure in his case. Last Wednesday, March 5, when Howell's attorney, Howard Pattison of Athens asked the court to disqualify itself, the Court forcefully rejected the suggestion, refused to hear further argument on the point and ordered Pattison to talk about something else. "Sometimes, the truth is too painful for people to hear," Howell said. "If there ever was a case for the use of this constitutional provision, this case, where one of the court's own members is suing his political opponent, is the case."

Howell promised that he and his lawyers would go to

work immediately to take the case into federal courts. He declined to state definitely where or when his federal case would be filed. He explained that it would require time to study the matter. He stated that it is possible to go directly to the United States Supreme Court or that he might choose to go to the United States District Court. In view of the approach of the election, he was emphatic that a decision would be reached promptly. "We will file our federal case within ten days or less," he predicted.

**** thirty ****

[R.779, 89]

[News Article,] THE TEXAS LAWYER [Austin, TX]

April 2, 1986, p. 1

HOWELL SUES TEXAS SUPREME COURT

Special to TTL

HOUSTON—Rebuffed by the Texas Supreme Court, Dallas Court of Appeals Justice Charles Ben Howell has turned to federal district court here in his bid to challenge incumbent Texas Supreme Court Justice James Wallace.

Howell filed suit March 25, seeking to overturn an order of the Texas Supreme Court March 12 that Howell must run

for Place One (incumbent Justice Sears McGee's position) instead of Place Three (Wallace's spot). The Texas court held that since Howell originally filed for Place One and attempted to condition his withdrawal from Place One on his acceptance on the ballot in Place Three, he had effectively filed for two positions in violation of the Election Code.

His federal suit claims that the Supreme Court should have recused itself from hearing the case since Wallace, a member of that court, was Howell's political opponent. Howell specifically faulted Chief Justice John L. Hill, Jr., for ignoring the disqualification issue in the five-page opinion.

"Sometimes the truth is so painful that people will not mention the subject," Howell said in a prepared statement. "However, the issue simply will not go away." The federal complaint charged that Howell could not get a fair and impartial hearing from an all-Democratic high court when "everyone on the bench was a political activist for the opposing party." Howell is a Republican.

He also chided the court for deciding a case brought by a fellow worker, calling them "day to day associates and cronies of the judge who filed the Supreme Court petition."

In the case, Wallace and McGee did not participate in the decision, Justice Raul Gonzalez dissented and would have permitted Howell to remain in Place Three.

Howell said the Texas Constitution provides for the governor to appoint a special Supreme Court panel to hear any case in which regular judges are disqualified (Article 5, Section 11).

"How was it possible for me to have a fair and impartial trial under these circumstances?" he asked. "If there ever was a case of the use of this constitutional provision, this is the case."

He claimed that the Supreme Court applied a strict standard when construing the papers he filed to be placed on the ballot when, at the same time, applying a "relaxed or liberal standard to Judge Wallace's papers."

[R.779, 807]

[News Article,] DALLAS TEXAS HERALD

Friday, April 25, 1986, p. 25A

LETTERS—COURT'S ACTIONS TRANSPARENT

To the Editor:

The Times Herald has reported legislative testimony by Chief Justice John Hill insinuating that someone provided me with an advance leak as to "the timing and result" of the suit

brought by his Democratic fellow judge, Jim Wallace, to throw me off the Republican primary ballot as a candidate for Judge Wallace's seat. I can't know what kind of advance information about the case was given to Judge Wallace, who is there every day, but any notion that this Republican judge from 200 miles away in Dallas received inside information from this all-Democratic court is absurd on its face.

As soon as the hearing was concluded on March 5, I did visit with several media representatives, including Patti Kilday from the Times Herald, and made several predictions concerning the case.

I predicted that the decision would be be announced exactly one week later, on March 12 (a correct but easy prediction). I predicted that the judges would permit their co-worker and fellow Democrat to win the case. (This prediction took no ouija board.)

I predicted that Judge Kilgarlin would write the court's decision because he is generally viewed as the most politically oriented judge on the court. I further stated that it is a tradition on the U.S. Supreme Court and most state supreme courts for the chief justice, a show of solidarity, to sign decisions for the court when cases are contentious or controversial. If Kilgarlin did not author the decision, I predicted that Hill would (Hill did).

I predicted that when the opinion was delivered, it

would not contain a single word about my No. 1 contention, that the Supreme Court was disqualified to hear this case and that the governor should be asked to appoint a special bipartisan court as provided in the Texas Constitution (100 percent correct).

I also predicted that Judge Gonzalez has a tough election battle on his hands, that he would disassociate himself from this injustice, and that he would write a dissent, just as he did in the throw-Buster-Brown-off-the-ballot case only a few weeks previous (correct again). I stated that Judge Campbell also was facing a tough election and he might join in the dissent, but I further stated that Judge Campbell does not have a reputation of being highly motivated, and my best estimation was that he would not dissent (he didn't).

My analysis is that some members of the media have related my prognostications, freely and openly made, back to Judge Hill and he now suspects that I have a "deep throat" within the court. Ridiculous! These gentlemen just don't realize how transparent their actions are when they insist on presiding in a case where their conduct is subject to question. I suggest that the Texas Supreme Court did not regain any of its lost integrity in the throw-Judge-Charles-Ben-Howell-off-the-ballot case.

CHARLES BEN HOWELL

Dallas

[R.779, 808]

[News Article,] DALLAS TIMES HERALD

Monday, May 5, 1986

HOWELL WINS FIGHT WITHOUT SWITCHING

By FRANK BURGOS
Staff Writer

Two months ago, Dallas appeals justice Charles Ben Howell unleashed spirited criticism of the Texas Supreme Court for not allowing him to switch his high court candidacy from Place 1 to Place 3.

But Saturday, it was clearly a moot issue.

For Howell, who had tried to switch his candidacy to Place 3 so he could run unopposed, Place 1 did not pose much of a problem after all.

The colorful and sometimes controversial appeals court judge won easily over heavily favored Dallas District Court Judge Nathan Hecht with 60 percent of the vote after a bitter contest.

Howell, who once was accused of wearing pajamas in

court, said people who expected Hecht to win, "were reading the tea leaves according to the man who could raise the most money. They didn't prove out in this race. . . . I think that's a good sign."

In November, Howell will face whoever wins the June 7 runoff in the Democratic primary. With the defeat of incumbent Justice Sears McGee, the contest for the Democratic ticket is now between Dallas State Sen. Oscar Mauzy and San Antonio Appeals Court Judge Shirley Butts.

Howell originally filed in Place 1 for a chance to challenge McGee in the general election. Only minutes before the filing deadline, however, he switched to Place 3.

"I wanted to avoid a primary contest," said Howell, who has run for public office several times since 1961 but won his first political contest in 1980 with a spot on state district court.

"I was running on a shoestring," he said. "I wanted to conserve my resources for the main event."

But the state Supreme Court squashed the move, saying his application for Place 1 was already on file. Howell now attributes his victory to the court's decision.

"I think part of my win was due to the indignation of the Republican voters to the way Texas Supreme Court treated me," Howell said.

He said the ruling was "a political hatchet job. . . . The Democratic party has monopolized the Texas Supreme Court for more than 100 years."

If he wins, Howell doesn't expect his stern criticism of the court to make him ineffective with his brethren.

"One strong voice, even though outnumbered, may create an impetus among the other jurists to straighten up and fly right," he said.

Howell often has been embattled during his 25-year political career.

In 1974, he sued the State Bar of Texas for $2 million after the organization tried to disbar him. Howell said his suit, which charged the bar association with conspiracy, was reason for his recent poor showing in the Dallas Bar Association judicial evaluation poll.

In this election, he filed a $1 million libel lawsuit against opponent Hecht, charging him with spreading "a continuing series of distorted, scurrilous and untrue statements."

Hecht, in letters to Republican leaders, had said Howell has "worn pajamas in court."

Now that he has won the election, Howell said he is not

certain he will go ahead with the libel suit. He also admitted he did wear pajamas to court several years ago when he was called to Judge Dee Brown Walker's chambers, but only because he was ill with the flu and "they rousted me out of a sick bed."

[R.779, 809]

NEWS RELEASE

File Date: December 8, 1987 For Additional Information:
11:00 a.m. Judge Charles Ben Howell
Release: Immediate (214) 823-8400

AUSTIN, TX.—Dallas Appeals Court Judge Charles Ben Howell today became the first Republican candidate to formally announce for a seat on the Texas Supreme Court. At 10:00 this morning, he filed papers with the Secretary of State declaring that he is a candidate for place three on the court, now held by Raul Gonzalez.

"The time for judicial reform is here and now," Howell declared in a press statement made immediately afterwards. "The Texas Supreme Court has become a national disgrace, by reason of Texaco v. Pennzoil and by courtesy of CBS and '60 Minutes.' "

"I don't want to comment about the merits of a case that is still in litigation," he said. "I do declare that the manner in

which Texaco was handled by the Supreme Court was a disgrace. First of all, the judges, practically all of them, have taken gobs of money in contributions from both sides. Political contributions in the $50,000 range from a single law firm are downright obscene.

"Obviously, this case put the judges on the spot. Either way they ruled, they were bound to make some of their big money backers mad. What do they do? They pulled a cop-out. They refused to hold a formal hearing; they refused to allow the lawyers to appear in front of them and argue the case; they refused to prepare a judicial opinion explaining their reasons for deciding the case. Instead, they discussed the case in the back room and instructed the court clerk to issue a one line announcement that the Supreme Court had refused to become involved on account of supposed 'no reversible error.' Is this the proper type of justice to dispense in the largest, most highly publicized case ever to come before the court?

"Texaco v. Pennzoil involves not only billions of dollars, enough money to pay $1,500.00 to every registered voter in the State of Texas—it involves thousands of Texas jobs, hundreds of thousands of shareholders, in Texas and around the world. Counting all of Texaco's customers, dealers, and suppliers, the Texaco case involves the entire Texas economy.

"What did the Texas Supreme Court have to say when this blockbuster case came to it? Nothing!! It sent the parties away empty handed. Apparently, the judges want us to believe

that they were too busy. I say, they should never be too busy to concern themselves with justice and the welfare of the entire state.

"The reason the court refused to get involved is obvious. It had political IOU's outstanding to both sides. However, the biggest contributions came from the Jamail-Pennzoil side. The court put political expediency ahead of its duty. The judges copped out in favor of their pocketbooks.

"Too long, Texas has suffered from a one-party judicial system controlled by a handful of lawyers. Texas needs judicial reform. Judicial reform begins at the ballot box. Those who live by the established system will never agree to meaningful reform. I intend to become one of the first Republicans in this century to be elected to the Supreme Court in his own right; I intend to change things on our highest court."

Judge Howell ran for the Supreme Court in 1986. With a $50,000 campaign fund, battling against an opponent with one and one-half million, Howell garnered almost 45% of the vote. "We intend to do a little better in '88," Howell declared.

He was one of the first persons in modern times to campaign for judicial office on the Republican ticket. Elected as a district judge in 1980, he was re-elected in 1982. In 1984, Judge Howell moved up to the Court of Appeals making him a three time winner—each time with a larger margin of votes. "Victory will be ours in 1988; the people are demanding an end to a one-partisan judiciary and the good old boy system

that is irrevocably tied to it."

* * * 30 * * *

[R.779, 834]

[PROCEEDINGS IN RELATED CASE,
TEXAS SUPREME COURT,
HOUSTON LIGHTING V. REYNOLDS,
NO. C-5499.]

[Chief Justice's Certificate of Disqualification]
[Dated May 3, 1988]

The Honorable William P. Clements, Jr.
Governor of Texas . . .

I certify that I am disqualified by the mandatory requirements of Rule 15a(1)(a), Texas Rules of Appellate Procedure, from participating in the determination of cause number C-5499, *Houston Lighting & Power Co. v. Carol Ann Hauser Reynolds, etc.*, now pending before this Court.

Pursuant to Texas Constitution, article V, § 11 and Texas Government Code § 22.005, you are requested to immediately commission a person possessed of the qualifications prescribed for Justices of the Supreme Court to hear and determine this case.

[Governor's Appointment of Special Chief Justice]
[Filed June 27, 1988]

The Honorable Jack M. Rains
Secretary of State . . .

Please be advised that pursuant to Article V, Section 11 of the Constitution of the State of Texas and Section 22.005 of the Texas Government Code I am today appointing the following individual to serve as Chief Justice of the Supreme Court of Texas in the matter of Houston Lighting & Power Co. v. Carol Ann Hauser Reynolds, etc., Cause No. C-5499, currently pending before that court:

THOMAS W. LUCE III
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Mr. Luce will serve in the place of Chief Justice Thomas R. Phillips who has certified his disqualification to hear the above matter tó me. Please issue a commission to this appointee as soon as he has qualified.

[News Article,] DALLAS TIMES HERALD

Saturday, June 4, 1988, p. 1B

[Filed, Microfilm Records, Dallas (TX) Central Public Library]

CHIEF JUSTICE DISQUALIFIES SELF FROM CASE

By Fred Bonavita
TIMES HERALD AUSTIN BUREAU

AUSTIN—Chief Justice Thomas R. Phillips has disqualified himself from a Supreme Court case in which his former law firm is involved and has asked Gov. Bill Clements to appoint a special temporary justice to take his place.

Phillips declined Friday to elaborate on the rare request. But court observers said the action means the state's highest civil appeals court is deadlocked 4-4 on the appeal of a $3.7 million judgment against Houston Lighting & Power Co.

The Texas Constitution requires a majority of the court—in this case five of the nine members—to decide a case. A court official said the most recent call for appointment of a temporary justice to break a tie was made in the mid-1920's.

James Huffines, Clements' appointments secretary, said the special justice would be named within 10 days.

In a letter sent to Clements last month, Phillips said he disqualified himself from deciding the case because his former Houston law firm, Baker & Botts, represents HL&P.

"Under the rules, I had to get out," Phillips said Friday.

* * * *

Phillips, a former state district judge in Houston before being appointed chief justice by Clements this year, said rules of judicial procedure that became effective Jan. 1 require him to recuse himself in cases such as this.

Although he did not participate in the defense of HL&P, he was a member of the law firm when the suit was filed, and lawyers with whom he practiced represented the company in court, Phillips said.

Supreme Court, U.S.
FILED
MAR 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1,305

IN THE

Supreme Court of the United States

October Term, 1989

CHARLES BEN HOWELL, ET AL.,

Petitioners,

v

THE SUPREME COURT OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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US Sen. Rpt., 94-404 p.25 (75) fn3

Petitioners, Charles Ben Howell et al. hereby request leave to present this supplement to their petition for certiorari pointing out recent proceedings in the United States Supreme Court and the United States Court of Appeals pertaining to issues in petitioner's case and seeking alternative relief on the basis of further research petitioner was unable to include in his original petition.

REQUEST FOR ALTERNATIVE RELIEF

Should the Court decide not to grant a writ for the purpose of fully deciding the case on its merits, then in such instance, petitioners request that the writ be summarily granted and that the judgment of the Court below, the United States Court of Appeals for the Fifth Circuit, be vacated and the case remanded to that court with instructions:

(1) That the Court of Appeals reconsider its Issue One (Question One here) in light of *Pennzoil v. Texaco*, 481 US 1 (86), and;

(2) That the Court of Appeals also reconsider its Issue Three (Question Two here) in light of the fact that petitioners have challenged the action of the Texas justices as void, that none of the authorities relied upon by the Court of Appeals purports to lay down a rule respecting void judgments, and that another court of appeals has recently made a contrary ruling, and;

(3) That, in addition, the Court of Appeals reconsider Issues Four and Five before it (Question Three here) in light of this Court's decision to be rendered in the case of *Cooter v. Hartmarx, cert.grtd*, — US —, 58 LW 3258 (no. 89-275, 17OC89). Pending a decision in *Cooter*, the Supreme Court should withhold its final ruling.

(4) Petitioner further requests that, in the interest of fairness, the Court below be instructed to provide to these petitioners a complete de novo hearing before another panel of the Court of Appeals.

ARGUMENT

Proceedings Below Relating to Question One: *Pennzoil v. Texaco*, 481 US 1 (87) is the latest decision of the Supreme Court regarding jurisdictional preclusion. For reasons that cannot be fathomed, the Court below has cited and quoted opinions of the Supreme Court dated from 1923 to 1983, but it has bypassed the Supreme Court's most recent decision in complete silence (see PA 7-12).

The omission to address the effect of *Texaco* was certainly not attributable to petitioner. At the outset, in his "Summary of Argument," petitioner cited the *Texaco* opinions of this Court and the Second Circuit, *Texaco v. Pennzoil*, 784 F2d 1133 (2-NY 86) four different times (ant.br.6-7). During his 21-page argument to the Court of Appeals in support of his Issue One, petitioner cited, discussed and quoted from the *Texaco* litigation 28 times. (ant.br.19-24, 7-9, 31, 3)[1]

Petitioner's reply brief to the Fifth Circuit was devoted to refuting a myriad of contentions by respondents.

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[1] In the argument under his Issue One, petitioner included the following subtitles:

> Texaco in the Second Circuit—The Feldman Window Applied to the Texas Rules of Procedure (ant.br. 19-20).
>
> Texaco in the Supreme Court—The Feldman Window Confirmed (ant.br. 20-1).
>
> [The Second Circuit Opinion in] Texaco . . . Did Not Expressly Hold that Raising a Federal Claim in State Court Was a Jurisdictional Preclusion (ant.br. 21-3)
>
> The Supreme Court, in Texaco . . . Indicated That Raising the Federal Claim in State Court Does Not Create a Jurisdictional Preclusion (ant.br. 23-4).

Nevertheless, petitioner cited and discussed the *Texaco* litigation sixteen times (ant.rep.2, 5, 7-9, 10-13, 29). Thereafter the *Texaco* litigation was cited or discussed seven times in the course of a nine-page petition for rehearing (ptn.reh. 2, 4-5, 8).[2] However, in spite of this petitioner's obvious insistence upon the importance of the *Texaco* litigation to the within case, the Fifth Circuit chose not to address *Texaco* in its decision (PA 1-13).

Proceedings Below Relating to Question Two: The argument and authority under Issue Three (ant.br. 1, 8, 37-43) are much the same as Question Two (ptn.cert. 23-7) herein. The Fifth Circuit cursorily brushed off Issue Three with the bald declaration that petitioner was seeking "the type of review the Supreme Court rejected in *Rooker, Atlantic Coast* and *Feldman*" (PA 11-2).

Petitioner's Reply Brief to the Fifth Circuit contained a topic arguing that *Rooker v. Fidelity*, 263 US 413 (23) and its progeny contained "not the slightest intimation that the state court judgment under attack was without jurisdiction or void" (ant.rep. 3-4).

Petitioner's third point on rehearing read:

> This Court seriously misconstrued . . . *[Rooker, Atlantic* and *Feldman]* in holding

---

[2]The petition for rehearing in the Court of Appeals contained three points, point 1 reading:

> This Court failed to apply the principles set out in Pennzoil Company v. Texaco, Inc., 107 S. Ct. 1519 (1987), which allow the application of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), in situations where the validity of a state rule is challenged first in state courts and then in federal court.

(ptn.reh. 2).

> that those cases forbid a collateral attack in federal district court upon a void state judgment.

(ptn.reh. 2-3) The argument thereunder quoted from *Rooker* wherein such authority carefully pointed out that it was addressing a case where the jurisdiction of the state court was plenary and no void-judgment claim had been suggested. Petitioner also urged that neither *Atlantic* nor *Feldman* possessed any void-judgment aspects (pet.reh. 6-8). Nevertheless, the Court persisted in its ruling.

Proceedings Below Relating to Question Three: Issues Four and Five (ant.br. 1, 9, 43-9) were substantially similar to Question Three before the Supreme Court. The Fifth Circuit limited itself to the comment that it could find no abuse of discretion on the part of the trial court (PA 13).

Petitioner's Case Was Not Fairly and Fully Decided by the Fifth Circuit: One of the questions accepted for review in *Cooter* was "(3) Is review of Rule 11 sanctions under 'abuse of discretion' standard appropriate?" 58 LW 3220-1 (pub. date 03OC89, condensation). We are advised that *Cooter* was argued February 20 and awaits decision. If Cooter's third question is sustained in any measure, it is plain that the Fifth Circuit seriously erred in the manner in which it reviewed the sanctions order in petitioner's case.

However, the Fifth Circuit took a much more sweeping view of abuse of discretion than the Court of Appeals did in *Cooter. Danik v. Hartmarx*, 875 F2d 890, 96-7 (CADC 88). There, the abuse of discretion challenge was only aimed at the alleged excessiveness of the sanctions imposed. Presently, your petitioner filed no attack upon the award as to amount. Instead, he has contended that in the absence of

disputed facts, the question whether this petitioner presented a sufficiently meritorious legal argument to insulate him from the imposition of sanctions is a question of law which must be independently reviewed by the appellate court.

Clearly, the Fifth Circuit has not applied the proper test. If the Supreme Court declines to grant a plenary hearing on the merits of Question Three, it should grant, vacate and remand, at least with respect to that question. The use of the grant, vacate and remand (GVR) device is well established in Supreme Court practice with respect to intervening decisions. *e.g.*, *State Bar v Howell*, 460 US 1065 (83); Stern, G. & S., *S.Ct.Prac.* §5.12(b)(6 ed.86). At a minimum the perfunctory review of the sanctions must be set aside and the Court ordered to fully consider the sanctions issue.

With regard to Questions One and Two, it is also evident that the Fifth Circuit has not issued a decision that begins to meet the arguments presented by this petitioner, the appellant below. We submit that the GVR device is singularly appropriate as a means to exercise supervisory jurisdiction over the Court of Appeals.

> As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation.

FL v Rodriguez, 469 US 1, 7 (84) (dsnt.). Stern, G. & S., §4.15. There are numerous cases illustrating the housekeeping powers and obligations of the Supreme Court. For example, even though orders denying removal from state court are expressly non-appealable, a district court will still be

forbidden to deny removal simply because its docket is overburdened. The Supreme Court, in the exercise of its supervisory powers will require the court below to exhibit a reason, recognized by law for remanding a case to state court. *Thermtron v. Hermansdorfer*, 423 US 336 (76).

A few years back, the federal appellate courts—the Fifth Circuit being in the lead—launched an experiment in omitting opinion writing, declaring such to be necessary in order to cope with the caseload. The practice brought a firestorm of protest[3] and has been greatly curtailed. The practice of writing superficial opinions is equally unsatisfactory and even more insidious.

It has been stated that one of the major functions of opinion writing, "and no slight one" is to assure to the parties that the case has been dealt with carefully and fully. Llewellyn, *Common Law Tradition*, 290 (60). We suggest that the opinion under discussion falls substantially short of that goal. The requirement that a decision maker explain his decision is widespread. A trial court sitting as a finder of fact must do so. FRCVP 52(a); FRCRP 23(c). Due process requires that an administrative decision maker "state the reasons for his determination and indicate the evidence he

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[3]Professor Bork charged that the Fifth Circuit had resorted to "[a] certiorari-type discretionary review . . . totally contrary to the traditional and statutory appeal as a matter of right." Bork, Dealing with the Overload, 70 FRD 131,3 (76). He stated:

> These trends . . . may erode the integrity of the law and the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy.

Id. A Senate judiciary report stated:

> Our concept of due process imposes limits on the nature and on the extent of permissible shortcuts in the appellate process. . . .

US Sen.Rpt. 94-404, p.25 (75)

relied on." *Goldberg v Kelly*, 397 US 254, 71 (70). *Accord: Morrissey v. Brewer*, 408 US 471, 88-9 (70) (Due process requires "written statement . . . as to the evidence relied on and the reasons for revoking parole.") The judiciary should live up to the same standards that are imposed upon administrative tribunals. *US v Fomess*, 125 F2d 928 (2-NY 42) (Jerome Frank, J.)

Quoting from Edmund Burke, Mr. Justice Frankfurter intimated that appellate decision writing is a due process fundamental.[4] We further present that he has struck upon the proper test for a minimally acceptable opinion; it must be *"a reasoned opinion."* It must demonstrate that the court has based its decision upon the law and the evidence rather than "whim or personal sympathy." Bork, *supra*. Applied to the case at hand, an opinion that fails to address the Supreme Court's latest decision in point—particularly when the appellant stridently and repeatedly urges that it is controlling, an opinion that relies on an authority that disclaims any intent to address the void judgment rule, an opinion that upholds sanctions for filing a supposedly frivolous action while failing to reach the plaintiff's jurisdictional arguments, is not the type of *"reasoned opinion"* that due process demands of a federal appellate tribunal.

There is direct precedent for the relief requested herein. In *Northcross v Board*, 412 US 427 (73), the Fifth Circuit denied a motion for award of attorney's fees without stating a reason for the denial. The Supreme Court vacated

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4 "Your committee do not find any positive law which binds the judges of the courts in Westminster-hall publicly to give a reasoned opinion from the bench, . . . But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land."
Rochin v. CA., 342 US 165, 70-1 (52).

and remanded "for further proceedings," presumably an opinion setting forth the lower court's reasoning. See also *CA v Krivda*, 409 US 1068 (72) (judgment vacated so that state court might supplement its opinion to indicate if its disposition was based on state or federal constitution); *simile: Mesquite v Aladdin*, 455 US 283 (82). This Court is no less hampered by the inadequate opinion in the case in hand than by the lack of one in *Northcross*.

Also, as the nation's legal system grows and expands, there remains but one Supreme Court. Strive as it might, the Court cannot grant plenary review to the same proportion of its docket as it did fifty, ten, or even five years ago. An ever larger percentage of litigants must accept the wisdom of the Courts of Appeal as their final recourse.

As a corollary, it follows that the housekeeping obligations of the Supreme Court are increasing. The Court has a greater obligation to see to it that hearings before the Courts of Appeal are full and fair. Likewise, the need for GVR is increasing. Even one order from the Supreme court requiring that a Court of Appeals further consider its decision will have a salutary and widespread effect upon the standards of appellate decision-making.

The Slate Must Be Wiped Clean: Inasmuch as the return of the case to the Court below for the replacement of an unsatisfactory opinion implies a criticism for its authors, the Supreme Court must require that the case be heard anew before an entirely different panel. Nothing less than *de novo* will suffice. No aspersions upon any member of the original submission panel is intended; they simply should not be exposed to the human temptation to convert the opinion writing function into an exercise in self-justification.

It is established that a judge who is the originator of a contempt complaint is barred from conducting a trial of those charges. *In re Murchison*, 349 US 133 (55); *Taylor v. Hayes*, 418 US 188 (74). The temptation to engage in self-justification is too great. Similarly, it is a common practice whenever a criminal conviction is reversed for sentencing error to require that the defendant be re-sentenced before another judge. *US v Huff*, 512 F2d 66 (5-GA 75).

Professor Hellman's research discloses that a very high proportion of GVR orders results in decisions that adhere to the original ruling. Hellman, *Granted, Vacated and Remanded*, 67 Judicature 389, 94-5 (84). It is our hypothesis that the Supreme Court rarely issues GVR orders unless it is concerned that the initial disposition may have been erroneous. The high proportion of unchanged dispositions raises questions whether a judicial tendency toward self-justification does, in fact, exist.

The requested GVR order will directly imply a criticism of the manner in which the case was handled by the Court below. The Supreme Court needs an analytical and completely objective opinion, not an opinion which must be inspected for indications of self-justification. The only means to assure that such will be received is to require *de novo* consideration before another panel. We again disclaim any intent to cast aspersions. However, a new panel is a necessity in order that justice not only be done but that justice appear to have been done. *Offutt v US*, 348 US 11,4 (54).

The Void Judgment Ruling of the Court Below Conflicts With a Recent Decision of the Third Circuit: Lacking significant authority or discussion, the Fifth Circuit has applied Rooker-Feldman to void judgment claims (PA 11-2). Approximately three weeks after the decision below, the

Third Circuit independently reached the exact opposite conclusion. *Re: Highway Truck Drivers*, 888 F2d 293, 9 n (3-PA 89).

We grant that neither did *Highway* probe the matter in depth. However, it has expressed the better view. In any instance, *there is now a direct conflict between the circuits.* The Supreme Court should issue a plenary grant of certiorari or apply GVR to resolve the conflict.

Conclusion: The writ should issue. Alternatively, petitioners should have the relief requested at the outset hereof.

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(3)

NO. 89-1305

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IN THE
Supreme Court of the United States
October Term, 1989

CHARLES BEN HOWELL, et al.,
Petitioners,

v.

THE SUPREME COURT OF TEXAS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' REPLY BRIEF

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QUESTIONS PRESENTED

(1) In deciding that the trial court was without jurisdiction to hear petitioner's complaint, did the Fifth Circuit Court of Appeals err in failing to discuss Pennozil v. Texaco, infra, and;

(2) Did the refusal of the Texas Supreme Court to recuse itself in Petitioner's litigation provide jurisdiction for the Federal District Court's to Intervene by creating a void judgement, and;

(3) Does the judgement below by the Fifth Circuit Court of Appeals conflict with In Re: Highway Truck Drivers and Helpers Local 107, and;

(4) Did the Fifth Circuit use the proper standard of review in reviewing the sanctions ordered by the District Court against the Petitioner?

PARTIES TO THESE PROCEEDINGS

Charles Ben Howell, Petitioner

Supreme Court of Texas, and the following justices thereof, Thomas R. Phillips, Franklin Spears, C.L. Ray, James P. Wallace, Ted Z. Robertson, Wiliam Kilgarlin, Raul Gonzales, Barbara Culver, and Oscar Mauzy, Respondents,
The State of Texas, Respondent
Texas Attorney General Jim Mattox, Respondent
Homecraft Land Development, Inc., Respondent
U S Home Corporation, Respondent
Stewart Title Company, Respondent
Bill Long, Dallas Co. District Clerk, Respondent

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Respondents, Justices Thomas R. Phillips, Franklin Spears, C.L. Ray, James P. Wallace, Ted Z. Robertson, William Kilgarlin, Raul Gonzalez, and Barbara Culver; and The Attorney General of Texas Jim Mattox and the State of Texas hereby request that both petitioner's request for leave to present his supplemental petition for Certiorari and the supplemental petition for Certiorari be denied.

RESPONSE TO REQUEST FOR ALTERNATIVE RELIEF

Should the Court decide not to grant a writ for the purpose of fully deciding the case on the merits, respondent requests that petitioner's request for leave to present his supplemental petition and his supplemental petition requests be denied.

REASON'S WHY THE SUPPLEMENTAL PETITION SHOULD BE DENIED

(1) The Fifth Circuit Court of Appeals was under no constitutional obligation under the circumstances of this case to discuss *Pennzoil v. Texaco, infra*.

Petitioner Howell asserts that the Fifth Circuit Court of Appeals erred in issuing an opinion that did not directly reference the case he considers most important in support of his position, *Pennzoil v. Texaco*, 481 U.S. 1 (1987). He offers no authority for the proposition that the case should have been directly addressed in the court's opinion, stating merely that the case should have been addressed

> For reasons that cannot be fathomed, the Court below has cited and quoted opinions of the Supreme Court dated from 1923 to 1983, but it has bypassed the Supreme

> Court's most recent decision in complete silence (See PA 7-12). (Pet. Supp. Br. p.2)

There are obvious reasons why the Fifth Circuit has chosen not to directly address *Texaco*. First, as Judge Nowlin who decided the case at the District level stated in his opinion:

> The problem with Howell's assertion of *Texaco I* as his "white horse" authority is that his federal case is factually distinguishable from *Texaco's* in a very important manner: unlike *Texaco*, Howell chose to raise his equal protection and due process challenges in the state action. The Second Circuit ruled that *Texaco* could pursue its equal protection and due process arguments in federal court because they had not been presented to or adjudicated by a state court, and they were not inextricably intertwined with the state court claims. That is simply not the case here.

Second, there was no need for the Fifth Circuit to cite *Texaco* since it merely reaffirmed one of the cases it did cite, *D.C. Ct. of Appeals v. Feldman*, 103 S.Ct. 1303 (1983), and provided no new avenue for federal district courts to handle such matters as are implied in this case, that have been resolved in the state courts. The United States Supreme Court stated in *Feldman* that:

> A United States District Court has no authority to review final judgments of a state court in judicial proceedings.

The *Texaco* Court merely supported this position:

> If and when, the Texas courts render a final decision on any federal issue presented by this litigation, review may be sought in this Court in the customary manner.

As we can see, *Texaco* only reaffirmed *Feldman*, providing no new avenue for the petitioner under the facts in this case. One could argue that the opinion provided a potential avenue for a challenge to petitioners who have not raised their federal claims in the state courts:

> Moreover, denigration of the procedural protection afforded by Texas law hardly come from *Texaco* with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case (Citation omitted)...Accordingly, when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary. *Texaco*, *supra* at 15.

Petitioner, however as noted above, has raised his federal claims in the state courts:

> Because Howell did raise his claim in the state court, allowing a new challenge in federal district court would necessarily require review of a final state court judgment. The *Feldman* analysis does not allow federal court adjudication in this case.

Howell v. Supreme Court of Texas, 885 F.2d 308 (5th Cir. 1989).

Petitioner mischaracterizes the comments of Professor Llewellyn from Common Law Tradition 290(6), when he said the author stated that one of the major functions of opinion writing is to ensure that the parties feel that the case has been "dealt with carefully and fully." The author actually stated that the function was to make sure that it was done "carefully and fairly." We cannot fathom how petitioner has made such a serious mistake about such a simple matter as reading and translating the text of publication.

Petitioner further complains that due process rules applicable to administrative tribunals also apply to federal appellate courts and their opinions, citing *Morrissey v. Brewer*, 408 U.S. 471 (1970); and *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, there are great differences between administrative tribunals and federal appellate courts. The federal appellate process is generally more time consuming, more expensive, and it generally deals with a much wider variety of issues that an administrative tribunal. Again, petitioner's citing of *U.S. v. Forness*, 125 F.2d 928 (2nd Cir. 1942) in an attempt to equate the two processes is misplaced as well as inaccurate in this context. However, even if petitioner's comparison was accurate the Fifth Circuit actions should be upheld because as petitioner would require through *Morrissey* and *Goldberg*, the *Howell* opinion by the Fifth Circuit that is in question actually states the 'reasons for his determination and indicate[s] the evidence he relied on.' *Goldberg v. Kelly*, 397 U.S. 254, 71 (70).

The issues raised by petitioners are addressed in the Fifth Circuit's opinion, although the Court did

not specifically discuss the holding in *Texaco, supra*. The Fifth Circuit could do no more short of allowing petitioner to outline its opinion. As Professor Llewellyn stated, it is more important [than ensuring that the litigants feel that the matter has been addressed carefully and fairly] that the opinions allow the winner, the loser and the whole bar to "get some working idea of what did the scoring for the victory." *Common Law Tradition, supra* at 290. The Fifth Circuit gave us that, and the petitioner should not now be allowed to add additional items to the scorecard. The United States Supreme Court's yearly docket has increased from a total number of 4,212 cases in 1970 to 5,268 cases in 1987, a 23% increase for the nine justices and their staff to handle in a short period of time. *Statistical Abstract of the U.S. 1989, 109th Ed. Dept. of Commerce*. During the same time period the Federal Appeal's Court cases have increased from 11,662 to 35,176, an increase of approximately 200%. *Statistical Abstract, supra*. This is an incredible workload for the 168 circuit court judges in the United States, and petitioner would complain that his major case was not discussed. Our federal courts are already overburdened, we will only exacerbate this problem by allowing attorneys to invade the province of the federal appellate courts to write their own opinions. See *Posner*, The Federal Courts: Crisis and Reform, 74 California Law Review 649 (1986).

(2) The Refusal of the Texas Supreme Court to Recuse Itself in Petitioner's litigation was not an unconstitutional act and did not provide jurisdiction for the Federal Courts to Intervene by creating a Void Judgment.

Petitioner is abusing the federal judicial process by continuing with this litigation. Originally petitioner followed the correct route and

sought a writ to the United States Supreme Court, and this was denied. *Howell, supra* at 310. He then decided to reword his complaint in an attempt to invoke the jurisdiction of the federal district courts. He now claims that the Texas Supreme Court's decision not to recuse itself is void, so the federal courts are justified in intervening. However, petitioner begs the question in making this argument. First, the justices are constitutionally disqualified only if they have a pecuniary interest in the case and none was ever shown. *Aetna v. Lavoi*, 475 U.S. 813 (1986). Second, the judges have never been otherwise disqualified, so the judgment rendered by them is not void though it arguably could be voidable if the justices could otherwise be disqualified. Finally, we must note that the previously cited Supreme Court decisions of *Texaco* and *Feldman* should control the disposition of this issue. See also *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281; *Rooker v. Fidelity Trust Co.*, 261 U.S. 114 (1923); and *Carbonell v. Louisiana Dept. of Health and Human Resources*, 772 F.2d 185 (5th Cir. 1985).

(3) The Judgment below by the Fifth Circuit Court of Appeals in this cause does not conflict with *In Re: Highway Truck Drivers and Helpers Local 107*, and hence there is no conflict between the circuits.

Petitioners submits that the Fifth Circuit Court of Appeals decision in this matter conflicts with *In Re: Highway Truck Drivers and Helpers Local 107*, 888 F.2d 293 (3rd Cir. 1989). However, his analysis is clearly flawed because the Third Circuit Court's decision in that case is clearly in line with the Fifth Circuit decision in *Howell*. The Truck Drivers Union filed a petition for voluntary bankruptcy after a jury verdict held it liable for "damages sustained in a shooting incident on

January 25, 1980, at a plant at which members of Local 107 were on strike and picketing." The judgment was rendered for $1.3 million dollars in favor of the Gajowski creditors. The State Supreme Court upheld this judgment after an automatic stay provision prohibited the Union from taking further action, the bankruptcy court (and subsequently the federal district court on appeal) lifted the stay and permitted the Union to contest the Supreme Court decision. Upon reconsideration of the question of the Union's liability the State Supreme Court reversed its decision and held that the Union was not liable for the damage award. The Third Circuit held that the district court was without authority to review this decision:

> Because the "judicial proceedings [of any court of any state] shall have the same full faith and credit in every court within the United States. . .as they have by law or usage in the courts of such state . . .from which they are taken" under 28 U.S.C. § 1738, we conclude that the validly entered judgment of the Pennsylvania Supreme Court is conclusive upon the parties in the matter of state law and must also be conclusive in relation to these federal proceedings. See, *e.g.*, *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 3 L.Ed. 411 (1813) (discussing the conclusiveness of state court judgments in relation to federal proceedings under the federal statute enacted in 1790, existing today in substantially the same form at 28 U.S.C. §1738). To hold otherwise would allow the district court to nullify retroactively a validly entered state court judgment, thereby emasculating the fundamental doctrines of federalism and comity.

> Moreover, a valid state court judgment cannot be enjoined or otherwise upset by a federal court on grounds that would not be available in the state court. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4469, at 668 (1981), citing *American Sur. Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 77 L.Ed. 231 (1932) (dismissing a federal action to enjoin enforcement of the state judgment on combined grounds of claim preclusion and full faith and credit). Because the issue of the bankruptcy court's alleged abuse of discretion could not be reviewed by the state court, and because a pending federal appeal on that issue could not interfere with the state court's jurisdiction of its own proceedings, the validly entered state court judgment cannot now be enjoined or otherwise upset by a federal court. "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts." *American Sur. Co. v. Baldwin*, 287 U.S. at 166, 53 S.Ct. at 101.

Truck Drivers, supra at 299.

Additionally, we must add that the Gajowski creditors, like the petitioners in this cause, specifically requested that the federal courts void a state court decision and this request was denied. *Truck Drivers, supra* at 298 n.7. The note in this opinion referenced to in petitioner's brief says nothing about void judgments, only that sometimes purely federal questions involving state litigation

can be handled by state courts, not issues such as are involved in this cause. *See Truck Drivers, supra* at 299, n.9.

(4) The Fifth Circuit properly used the abuse of discretion standard of review in reviewing the sanctions ordered by the District Court against the Petitioner.

Petitioner complains that the Fifth Circuit should independently determine if "petitioner presented a sufficiently meritorious legal argument to insulate him from the imposition of sanctions" before upholding the sanctions, rather that review them under an abuse of discretion standard. However, it does appear that this is the procedure followed by most other circuits as well. See *Westmoreland v. CBS, Inc*, 770 F.2d 1168 (D.C. Cir. 1985); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Stevens v. Lawyer's Mutual Liability Insurance Company*, 789 F.2d 1056 (4th Cir. 1986); and *Bass v. Southwestern Bell*, 817 F.2d 44 (8th Cir. 1987). Petitioner cites *Danik v. Hartmarx*, 875 F.2d 890 (D.C. Cir. 1988) to support his position that the abuse of discretion standard is not the proper standard of review of Rule 11 sanctions. However, the D.C. Court of Appeals in that case merely reaffirmed the abuse of discretion standard, even in cases which were dismissed prior to the ordering of sanctions. *Danik, supra*. "When the district court, without explanation, awards as a sanction an amount no greater than the costs and attorneys' fees incurred by a party moving under Rule 11 and the award is challenged as excessive, only the very rarest case could justify our finding its decision an abuse of discretion." *Danik, supra* at 897. This language is not meant to indicate that the abuse of discretion standard is inappropriate for cases where the sanctions themselves and not just the amounts awarded thereunder are challenged. The Court is simply saying that

upholding the amount of fees under the application of this standard is much easier when only the amount of fees is invoked since by disputing only the amount one must acknowledge their propriety. There is nothing to support petitioner's contention that the judgment is void. In fact the decision probably is not even voidable under Texas law. *See Steph v. Scott*, 840 F.2d 267 (5th Cir. 1988).

The petitioner should be aware of the requirements for Federal District Court intervention. *See Howell v. Thomas*, 566 F.2d 469 (5th Cir. 1978); *Howell v. State Bar of Texas*, 674 F.2d 1027 (5th Cir. 1982); *Howell v. State Bar of Texas*, 710 F.2d 1675 (5th Cir. 1983); and *Howell v. State Bar of Texas*, 843 F.2d 205 (5th Cir. 1988).

The Court should not grant, vacate and remand this case to the appeals court for a further investigation of these matters. A GVR order in this case will only cause undue burdens on the Court in years hence.

CONCLUSION

Petitioner's request is without merit and should be denied completely.